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THE

PORTER SPEECHES.

SPEECHES DELIVERED BY

THE HON. WILLIAM PORTER,

DURING THE YEARS 1839-1845 INCLUSIVE.

CAPE TOWN :

TRUSTEES ESTATE SAUL SOLOMON & Co.

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P R E F A C E.

In placing this volume before the public, it has been endeavoured, so far as is possible, to arrange, according to date, the utterances of the late Hon. William Porter during his first *lustrum* of office as Attorney-General of the Colony of the Cape of Good Hope, extending from the year 1839 to 1845, and embodying some of the most brilliant and interesting displays of oratorical talent for which the lamented Mr. Porter was so justly famed.

It is intended that the speeches reproduced in this volume should silently, but powerfully and eloquently, speak for themselves, as illustrative of the occasions on, and the measures in support of, which they were delivered. It has been the studied endeavour not to leave unrecorded any early public utterance from the time of our distinguished fellow-colonist's arrival in South Africa up to the last date mentioned, and not to hamper them with any laboured comments of his own, feeling convinced that such a simple course would best meet the desires of many of Mr. Porter's admirers, and that any such comments would best find a place in the event of a review being published at a later period. Besides this, Mr. Porter's personality is so fresh within the recollection of so many, that it is the *ipsissima verba* which are first of all required for perusal. Among the most conspicuous speeches of Mr. Porter, to be found in this volume, are his manly assertion of independence, and the independence of his office, when called upon, almost immediately on admission, to support officially a measure at variance with his own views; some of his earliest and most brilliant addresses at the meetings of the South African Public Library, an institution in which he took an unvarying interest; his earnest speeches in favour of the erection of a light-house at Cape L'Agulhas; on Infant Schools, Immigration, Paper Currency, Taxation, Labour, Roads and Magistrates, the Judicial Establishment, the Administration of Justice, and on every other measure of importance which came under the notice of the old Legislative Council during the seven years which this volume covers. It is hoped, therefore, that it will be found to be a valuable contribution to the legislative and general history of that period.

Cape Town, February, 1886.

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1839.

ON THE BILLS OF EXCHANGE BILL.

[*Legislative Council, Monday, October 21, 1839.*]

The SECRETARY to GOVERNMENT was far from objecting to the petition as coming from the chairman and committee of the Commercial Exchange ; but he did object to their having two strings to their bow. It appeared, indeed, as though, had there been a thousand petitions, these gentlemen would have signed them all. Petitions might as well have been brought in from half-a-dozen insurance, steam, and banking companies, to most of which these names would, he believed, be found attached. Besides he could not admit the petition to represent the feelings of the whole, not even of a majority of a commercial body, many of whom he believed to be opposed to this Bill. A petition had been before received from that body, purporting to be signed by the chairman, to which, however, a majority of the members were found to be opposed. He did consider it unseemly to have the signatures of hon. members on petitions, and he would put it to their feelings of propriety whether such a practice could be considered regular, as pledging them to one side of a question before it was discussed. It was also a well understood rule that mercantile firms could not sign a petition as "Harrison, Watson & Co.," but only as individuals.

The ATTORNEY-GENERAL fully concurred with the hon. Secretary in his last objection ; to which, however, the present petition was not obnoxious, there being no names of firms attached to it. If there were any such signatures to the other petition, it was cer-

tainly very injudicious in the parties who had so signed, as the signature could only be taken to be that of the individual whose name appeared, and, therefore, was of less weight than if every member of the firm had signed. But, unless it could be supposed that the signature was a forgery, it could not be taken as less than an individual name, and, therefore, could not detract from the validity of the petition. The same remark would also apply to the signatures of the chairman and committee of the commercial body. The circumstance of the same individuals having signed two or ten petitions on the same subject might be a very fair ground for argument against the importance to be attached to those petitions, as, "not being birds," these gentlemen have certainly no occasion to be in two places at once; but it could afford no ground for refusing to receive a petition which, coming as this did from men placed in a comparatively distinguished situation, could not but carry with it a certain degree of weight, notwithstanding their names having been unnecessarily appended to another. With regard to the objection which had been raised to the signatures of members of Council, he begged to submit an opinion, which he trusted would at least be found dispassionate. Sitting there, as it were, in their own little senate, they could not surely lay down any better rules for their guidance in such a matter than those which are in force in the two great legislative bodies of the mother country. Now it is the daily practice of members of both Houses of Parliament to sign Parliamentary petitions; and the more signatures of Peers can be got to a petition to the Peers, or of Commons to the Commons, the more respectable is a petition considered. He could state this from experience, having been personally engaged in canvassing for such signatures. No Parliamentary speaker ever dreamt of objecting to a petition on account of its being so signed; on the contrary it is often referred to triumphantly, as a proof of the goodness of the object, that it has been supported by so many of their own body. It is said: this Council is a deliberate body, and such a proceeding tends to foreclose discussion. But when a member introduces a measure, is it to be supposed, unless indeed—to use a vulgar phrase—he is humbugging the Council, that he has not formed an

opinion concerning it? And can any confidence be placed in the opinion of a man who will not authenticate his own sincerity by placing his name to it? A petition involves nothing opposed to the most perfect freedom of discussion, nor does it bind any member signing it to hold the same views after the measure has been fairly discussed. He merely declares, "I now think so and so, and I humbly pray you to take the matter into consideration, with respect to my present opinion." So far indeed from being indecorous, it is rather a respectful practice; and though in signing the other these gentlemen must be admitted to have injured their own petition, yet no further can they be said to have acted injudiciously, while the petition itself contains nothing that can be regarded as indiscreet or indecorous.

ON THE SAME SUBJECT.

[*Legislative Council, Wednesday, October 23, 1839.*]

THE SECRETARY TO GOVERNMENT presented a petition from certain individuals, praying to be heard by counsel against the Bills of Exchange Bill, which he moved should be acceded to.

MR. EBDEN begged to second the motion. It was very far from his intention to offer any opposition, as he would be glad to hear, even at the eleventh hour, whatever could be urged against the measure; but he would suggest that the Attorney-General be first heard as to the law.

THE ATTORNEY-GENERAL said he would rather hear the nature of the argument intended to be entered upon. Of course, the question as to whether there was a law or not would form a prominent part of that argument. Whether there was a law or not, he was prepared to argue that out of a state of doubt arose the necessity of a declaratory law, but whatever might be the opinion of the counsel employed, they should hear him out.

Mr. EBDEN said before proceeding to the order of the day, he begged, with reference to what passed at the last meeting of Council, on the subject of the petitions presented in favour of the Bill, to notice a remark which fell from the hon. Secretary to Government, respecting the chairman and committee of the Commercial Exchange, and which without explanation might be construed as casting a reflection where perhaps least intended. As the hon. Secretary, on being applied to for an explanation, had expressed his willingness to give that explanation in his place in Council, he now begged to call upon him to do so.

The ATTORNEY-GENERAL said before his hon. friend the Secretary to Government rose in reply, he must beg to say that he did not understand him, on the occasion in question, to cast any reflection on the commercial body of this place. A remark had been made respecting the form in which a petition had been signed, as to which he (the Attorney-General), if he recollected right, differed in opinion, but he certainly had not the most distant recollection of any reflection being thrown upon the mercantile body by his hon. friend, who, he felt, would be the last person in the Colony to do so.

Mr. EBDEN had no doubt of that ; he had merely said that without explanation the remark might be so construed. The words which he alluded to were, he believed, to the following effect : that a memorial had been, some time ago, received from the chairman and committee of the Commercial Exchange, to which he had reason to know that a majority of the committee were opposed.

THE NEW MARRIAGE LAW.

CORRESPONDENCE.

Swellendam, November 5, 1839.

TO THE EDITOR :

SIR,—From the desire which I have ever felt to see all classes of the community enjoy the privileges of lawful wedlock, the

provisions of the New Marriage Ordinance, in behalf of a certain portion of the coloured class, afforded me the highest gratification.

It appeared to me, however, doubtful whether, in the *spirit* of the 35th and 36th articles of the said Ordinance, such *free persons* as had been *de facto* married, but by the previously existing laws were debarred from the privileges of regular marriage, could now have the marriage legally solemnized, in the same manner as parties one or both of whom had been in a state of slavery.

As the ordinance in question, moreover, required that in the publication of marriage banns the *Christian name* of the parties should be published, it was to me matter of doubt whether this expression required previous baptism in all persons applying for marriage, or whether it was to be understood in its common acceptation, as merely the name usually prefixed to the surname.

On these points I applied for explanation to the Government, and received in reply the accompanying opinion of Her Majesty's Attorney-General, with permission to make any use of it I might deem proper. I therefore request you will publish it in an early number of your paper, and remain,

Your obedient servant,
W. ROBERTSON.

Opinion of Her Majesty's Attorney-General.

With respect to the points on which Mr. Robertson desires information, it appears to me—First, that the 35th and 36th Sections of the Marriage Order in Council, of the 7th September, 1838, only relate to marriages *de facto*, in which one *at least* of the contracting parties was at the time in a state of slavery. The framers of the order probably conceived that, while the circumstances in which a slave was placed might render him a deserving object of the benefit intended, it would not be possible to place other persons on the same footing, without confounding what, in all probability, was criminal negligence or worse, with “the consequences of imperfect instruction.” Upon this point, therefore, I am of opinion that marriages

de facto can only be legalized by a new solemnity, so as to legitimise the children born intermediately, in cases in which one at least of the contracting parties had been in a state of slavery.

With respect to the second point referred to by Mr. Robertson, I mean the marriage of persons still heathens, it does not appear to me that there is any legal impediment to a proceeding of the kind. It appears to me that the direction to publish the Christian name in marriage banns, contained in the Order in Council, does not impose the necessity of baptism, but is merely intended as matter of description, and to secure the best evidence of identity. The modern Baptists have what may be fairly termed "Christian names" before they are baptized; and the primitive Christians were baptized without taking any Christian name at all. It is true, indeed, that both the classes I have mentioned are Christians; but still as both would be beyond doubt persons of whom the banns of marriage might be published, the one class proves that baptism is not essential, and the other class proves that a Christian name may also be dispensed with.

I do not say, it will be observed, that a minister is bound to publish the banns of marriage between persons still heathens, or to marry individuals so situated. This is not the point submitted to me. All I mean to say is, that if a minister have himself no scruples, if he thinks that his sacred calling imposes upon him the obligation rather to invite the heathen population to have a marriage solemnity performed, than to refuse to perform it when requested so to do, if he thinks that marriage is, in the language of Mr. Robertson, "a grand step in the improvement of their morals, and their fitness for baptism," then I give my opinion, as a lawyer, that he may legally marry persons still heathens, although they have no Christian name, and have never been baptized.

WILLIAM PORTER.

25th October, 1839.

BILLS OF EXCHANGE BILL.

[*Legislative Council, Thursday, October 24, 1839.*]

The GOVERNOR said, though he agreed with those who defended the Bill on the abstract principle, he thought it had been brought forward at a most improper moment. Why had it not been brought forward when money was abundant and interest low? He would ask the hon. mover why it had not been brought forward then?

Mr. EBDEN said he had not thought of bringing the Bill forward at the period alluded to, because there was no call for it. He brought it forward now, because the restriction was now felt to be oppressive and injurious to the public.

The GOVERNOR said it was his duty, as Governor, to allay alarm and excitement, and to remove or keep back everything that had a tendency to harrass or disturb the community. By the petitions before the Council, and by what was known out of doors, it was evident that the whole Colony viewed the Bill with apprehension and distrust. It was thus a measure hostile to the spirit of his policy, and went to defeat his endeavours to quiet and reconcile the feelings of the different classes of which the community was composed. On this ground, though it was plain that he would be left in a minority, he should move that the Bill be rejected; and not only would he give it his veto, when it was presented to him, but he would write home the strongest despatch that he could frame, to induce Her Majesty's Government to refuse their sanction to it. He would also call upon Her Majesty's Attorney-General, as a member of his Executive Council, to oppose the Bill on the public ground he had mentioned.

The ATTORNEY-GENERAL said that, as he approved of the measure, he must say, in answer to the call made upon him by His Excellency, that he did not consider himself bound down by the office he held from freely expressing his opinions upon it, nor precluded from voting in its favour, as he had expressed his determination to do. With the most profound veneration for the high office filled by His Excellency, and with the most sincere regard towards himself per-

sonally, he must add that if he found the office he had the honour to hold in this Colony precluded him from giving utterance to his sentiments, or from voting and acting in that Council in accordance with the oath he had taken when he entered it, then he would look out for the first vessel that was to leave Table Bay, and bid adieu to the Colony. And should an occasion ever arise in which, when he had the misfortune to differ from His Excellency's views, it should appear to His Excellency, or to himself, that his opposition would be inconsistent with the duties involved in his position here, then his course would be equally clear. With proper respect, but at the same time with perfect firmness, he would place his commission in His Excellency's hands and withdraw.

Thy spirit, Independence ! let me share,
Lord of the lion-heart and eagle-eye !

He would now add a few words on the motion for rejecting the Bill. On the principle there seemed to be a general agreement. But while some held that there was no law in existence here, and that therefore the Bill was unnecessary, though inclined to agree with them, he thought that as his learned friend Mr. Musgrave, and the petitioners in whose behalf he had appeared, were of a different opinion, it became the imperative duty of the Legislative Council, by some Act, declaratory or otherwise, to put an end to all doubt and uncertainty on the subject. If this was evaded, some case would be brought into the Supreme Court of Justice with a view of obtaining, by a decision, a declaration of the law. If there was excitement, if the public were angrily divided on the subject, was it not highly inexpedient to throw the burden of decision, that would be regarded with a hostile and suspicious eye by one party at least, on the Judges of the land ? When such a necessity occurred, it was always to be regretted ; and, consequently, when it was foreseen, it was the peculiar duty of the Legislature to anticipate the evil, and by its proper function to relieve the Judges from the pressure of a duty that ought not to be forced upon them, in the discharge of which, act as they might, they would inevitably incur ill-will and misconstruction. This being clearly foreseen, he would press upon His Excellency and the Council the propriety of proceeding with this Bill.

The GOVERNOR said he had no intention of interfering with the

freedom of debate, which the Attorney-General had in so manly and straightforward a manner vindicated for himself. But as the defenders of the Bill had maintained that there was no law in this Colony on the subject, and as he understood the Attorney-General to be of that opinion, he had called upon him, as his legal adviser, to vote against a Bill that proposed to repeal a law that did not exist ! What could any sensible person out of doors say of such a proceeding ? Would they not say : " What fools the Legislative Council must be, and their President at the head of them, in passing Bills for the repeal of laws which at the same time they believe to have no being ! " He would never consent to have his name mixed up with such proceedings. He would therefore press his amendment to the vote, that his dissent might be recorded.

The ACTING AUDITOR-GENERAL seconded His Excellency's amendment.

Mr. EBDEN, as the mover of the Bill, then rose and said, that before putting to the vote His Excellency's amendment, it was, he believed, competent for him to reply. He had intended to have offered a few observations on the statement of the learned counsel who had been heard against the Bill, but, prepared as he was to show that his premises and deductions were alike erroneous, this was rendered unnecessary from the course the proceedings had assumed. But as the learned counsel, impressed with the weakness of the case he had been called on to advocate, had been compelled to seek refuge in an appeal to the feelings of His Excellency to put his veto to the Bill, it only remained for him (Mr. Ebden) to express his hope that His Excellency would pause before he adopted any such advice in opposition to the expressed sense of the Council and the decided opinion of his honourable and learned friend, Her Majesty's Attorney-General ; and as he denied that there was anything peculiar in the position and local circumstances of this Colony to justify the fears and apprehensions which had been expressed, he did hope that His Excellency and the Council would refer to the authorities which had been quoted in favour of the measure, as well as to the opinion of the Lord High Chancellor of England, as read to the Council from a reported speech of his lordship, touching a

recent enactment of the Imperial Parliament, on which this Bill was founded. Taken by surprise by the observations which had fallen from His Excellency, he could but view the course adopted as tantamount to an infringement of freedom of debate, which had been guaranteed to the Council ; at least, such were his impressions (Here the honourable member was interrupted, and called to order by His Excellency. His Excellency vehemently disclaimed any intention of restraining debates, and said the honourable member had no right to make such a remark.) Mr. Ebdon on resuming, said that he meant no reflection on His Excellency, and was understood to say, that if wrong in the construction he had ventured to put on the act of His Excellency, in having called upon the Attorney-General as a member of the Executive to give him his vote in support of his amendment, he was glad to be set right, sorry as he should be to be thought wanting in deference and respect to His Excellency, to whom his thanks were due for the candour he had evinced on this as well as on former occasions. Looking, however, to the course the proceedings had assumed, he should not trespass on their indulgence beyond reverting to the abstract proposition he had ventured to submit to His Excellency and the Council, at the opening of the debates on this important question, which, in substance, was : "That the usury laws originated in false notions of policy and justice, were repugnant to reason, unsound in principle, and injurious in practice." No problem in mathematics had ever been more clearly demonstrated, no truth more perceptible to the mind's eye had ever been made more manifest to the light of human reason, than this proposition had been, by the powerful, eloquent, convincing, and unanswerable argument of his honourable and learned friend the Attorney-General, who, with a perfect mastery of his subject, had left no part of it untouched, but had dispelled all doubts, or demolished all objections, and allayed all fears and apprehensions in respect to the measure, which might previously have been entertained by His Excellency, the Council, and the public. Under these impressions he could not conclude without congratulating the Council, the friends of free trade, and the Colony at large, on the acquisition of so powerful an advocate of the immutable principles of justice and good government. Humble

individual as he was, he would yield to no man in zeal to promote the welfare of this Colony, and his country by adoption. Whatever might be the fate of the Bill, he could not abstain from expressing the satisfaction he had derived on seeing the principle for which he had contended so irresistibly illustrated. Law or no law, the thanks of the Colony were due to his honourable and learned friend for having placed this question in its proper light. Inclined as he (Mr. Ebdon) was to yield to the belief that there exists no law in this Colony restricting the rate of interest, which certainly the authorities produced by his honourable and learned friend (Mr. Cloete) went to confirm, he felt that, whatever doubt might still exist on this head, he should best perform his duty to the public by leaving the Bill in the hands of his honourable and learned friend the Attorney-General, who, he had reason to believe, was prepared with some declaratory enactment, which with any other amendments he might have to offer would have his decided support.

After some desultory conversation,

The ATTORNEY-GENERAL said he had an amendment to propose, in which he thought it was possible for all parties to agree. It would require, however, a material alteration both in the preamble and body of the Bill. It was to this effect: That whereas doubts had arisen as to the existence of any law in this Colony by which the rate of interest on loans and discounts is limited, &c., be it enacted, that from and after the passing of this Bill, the legal rate of interest, &c., shall not exceed the rate of six per cent. per annum, and that on the 1st of January, 1840, this Bill shall expire, unless previously renewed," &c. An enactment of this nature would fulfil all the purposes which the supporters of the Bill had in view. It would obviate the objections of those who opposed the present Bill on the ground that there was no law to be repealed. It would fix the rate of interest at six per cent. in the meantime, which would remove all doubts as to the illegality of what are termed usurious transactions on the part of unprincipled dealers in money.

This amendment was opposed on the ground of its entirely altering the principle of the Bill. This the Attorney-General admitted was undoubtedly a valid technical objection. The amendment was then withdrawn.

Mr. EBDEN then rose and said, seeing the technical objection which had been made to the Bill in point of form, and yielding to the force of His Excellency's objection on this head, he was prepared to have given his assent to the amendment of his honourable and learned friend the Attorney-General ; but as His Excellency and the Council had come to the conclusion that there were no usury laws in this Colony, a conclusion warranted by the authorities quoted by his honourable and learned friend (Mr. Cloete), to whose researches they were so much indebted, and as, in the absence of any usury law, it was far from his intention to make one, the object in view being attained, he should now withdraw the Bill, any labour which he had bestowed upon it having been amply repaid by the result, and he should take no blame to himself for the excitement it had produced.

1840.

THE HANOVERIANS.

Opinion of Her Majesty's Attorney-General.

I have considered this case with some attention, and regret that I have not been able to form any very decided opinion with respect to it. But I deem it right not to withhold the views, such as they are, which have presented themselves upon the subject.

The recent proceedings connected with the right of Hanoverians to be admitted to the freedom of the City of London, had not reached their final termination when our last accounts were forwarded ; and therefore those proceedings cannot be regarded as conclusive.

It does appear, however, that the Recorder, the Common Sergeant, Dr. Addams, and Mr. Craig—some of them eminent as lawyers, and all of them respectable—are unanimously of opinion that a Hanoverian, born in Hanover during the period in which the Crown of that Kingdom was worn by the Sovereign of England, is a natural born subject of the State last mentioned, and entitled to all the rights, liberties, and privileges, belonging to that character. The Court of Aldermen, we find, dissatisfied with the practitioners already consulted, have directed a case to be laid before the Law Officers of the Crown and Sir William Follett. The result has not yet transpired, but it is satisfactory to know that so interesting a question is to receive so thorough an investigation.

Were the point in doubt now submitted for the first time—no similar one having ever been decided—it might, I think, be confidently anticipated that judgment would be given against the right of Hanoverians born to be considered British subjects. Hanover is, and always has been a distinct kingdom ; it sometimes belongs to the King of England, but never to the Crown of England ; it makes treaties with England like a foreign power ; it keeps a

minister in London like a foreign power ; it may be at peace when England is at war ; it may be at war when England is at peace. Belonging merely to what Blackstone calls “ the person of the king,” and being, as the same author observes, “ entirely unconnected with the laws of England,” and “ not communicating with that nation in any respect whatever,” the first impression the mind of an enquirer might reasonably be, that the accidental coincidence was far outweighed by the essential diversity, and that the mere circumstance of the same natural man ruling by distinct titles two otherwise distinct countries, could never raise a reciprocal right in the subjects of each to be classed amongst the subjects of the other.

But to this conclusion some weighty, I had almost said some preponderating, reasons are opposed. Alienage is not favoured by the liberality of the English law. The person of the sovereign is so profoundly revered by the British constitution, that we may well regard as fellow-subjects all who hold allegiance to the same monarch. The king can grant letters of safe conduct to any alien envoy. The king can grant letters of denization to any alien friend. These are amongst his constitutional prerogatives. Is it then unreasonable to go a step farther, and allow that those who stand to the king in a relation so intimate as that of subjects, are, *ipso facto*, naturalized in every part of his dominions ?

Still, these are general considerations ; and general considerations, upon a question of this kind, are not worth much. It is of more practical importance to observe that a question very like the present was ruled by the Lord Chancellor, and twelve out of the fourteen judges of England, in favour of a person claiming the disputed right. I refer, of course, to the decision reported with extraordinary pomp and circumstance by Lord Coke under the name of “ Calvin’s Case,” and which is termed by Bacon, who as Solicitor-General argued it in the Exchequer Chamber with consummate skill, the case of the *Post Nati* of Scotland.”

The point here was whether a man born in Scotland after the accession of James I. to the throne of England was, in consequence, naturalized in the latter country ? and the Chancellor, Lord Ellesmere, and all the judges except two, determined that he was.

I presume that this memorable judgment is still law. It is true

that much of the reasoning on which it was founded seems quibbling and unsatisfactory. It is true, moreover, that the case was decided when a Scotchman was king, and when notions of regal power and prerogative were entertained, much more exalted than any which prevail at present. It is farther true, that a number of lawyers even then dissented from the principle laid down. But he would be "a bold man," as Lord Holt once said upon another subject, who should set aside a solemn judgment, if in point, on such grounds as have been now adverted to.

Is, then, Calvin's case in point? Dr. Addams and Mr. Craig say it is; and in my own view of it, the only important difference between Scotland then, and Hanover of late, was that the Crown of Scotland, agreeing with the Crown of England, descended to the heirs general; while the Crown of Hanover, differing from the Crown of England, is restricted to the heirs male. Until all the issue of the king had failed, there could, in contemplation of law (I except, of course, the case of revolution), be no separation of the Crowns of England and Scotland, but the operation of the Salic law in Hanover creates a different canon of descent. This certainly adds another to the circumstances in which the arms of Hanover and Great Britain differ; and, as Lord Bacon allows, whether the privilege and benefit of naturalization be an accessory or dependency upon that which is one and joint, or that which is several, hath been, and must be, the depth of the question.

It is, indeed, to be remembered, that the possibility that the Crowns of England and of Scotland might at some future period become separated, was strongly urged in Calvin's case, against the claim of the *Post Nati*; and it seems to have been disregarded by virtue of the well known rule, that possibilities subsequent do not affect existing rights. I am not sure that the rule was fairly applicable there, and even if it were, I am not sure that it is equally applicable here.

That the common opinion has always been that Hanoverians, as such, are not British subjects, admits, I believe, of no dispute. They have, in numerous instances, been naturalized by Act of Parliament. When that process, or some other, has not been

resorted to, they have always, as merchants, paid the alien's duties. But a stronger proof of the opinion entertained has occurred to me while considering this case.

The 12th William III., c. 2.—the Act of Settlement—an Act passed expressly against Hanover, contains the following provision : “That after the said limitation shall take effect as aforesaid, no person born out of the kingdom of England, Scotland, and Ireland, or the dominions thereto belonging (although he be naturalized or made a denizen), except such as are born of English parents, shall be capable to be of the Council, or a member of either House of Parliament, &c.”

It will be obvious that the framers of this Act (and some great lawyers had a hand in framing it) seem never to have thought that a Hanoverian born in Hanover, even after the junction of the ruling power in the same person, could be regarded as a British subject. On the contrary, so far from placing Hanoverians upon a better footing than aliens generally, this Act places aliens generally on a worse footing than they stood on previously, in order to exclude Hanoverians. It would be strange enough if those in order to reach whom the Act of Settlement disqualifies, and to a certain extent all other aliens, should be found after all to be no aliens themselves.

If Hanoverians were British subjects, then Buonaparte was justified by the law of nations in seizing Hanover when England declared war against him in 1803. But was not that proceeding denounced at the time as a flagrant and indefensible aggression ?

Whether the Germanic Confederation, of which Hanover is a part, is truly an association of independent nations, like the Holy Alliance, or one composite government made up of many parts, like the United States of America, I am not sufficiently acquainted with its very complex machinery to determine. If it be the latter, a number of cases may be put in which the principle that Hanoverians are British subjects would lead to much embarrassment. Indeed, as the Germanic Confederation, whatever may be its precise character, is bound to protect all its members from aggression, a difficulty may be very readily supposed. Were England to

declare war against another member of the Confederation, what is Hanover to do? I presume if the natives be naturalized British subjects, they would be guilty of high treason if they "levied war" against the King of England; and if they declined to do so, they would be destroying the principles of their solemn compact and Confederation.

To all this it may be replied, that upon a subject of this kind anomalies are to be expected, that a separate legislation, for instance, is necessarily pregnant with many such, yet that while Ireland (to take a well-known case) had a separate legislation, the natives of Ireland were naturalized British subjects. All this is undeniable. But still there was always this grand distinction between Ireland and Hanover, that Ireland and England, though with distinct legislatures, had the same executive; while Hanover and England had both legislatures and executives distinct. The Government in Ireland was a British Government, and its members were, I take it, impeachable by the British House of Lords. The case of Strafford proves this; for although the Commons unwisely dropped the impeachment against him, and substituted an Act of attainder, no one ever doubted that he was legally impeached. The circumstances of Hanover are completely different.

Upon the whole, I lean, reluctantly, to the idea that a Hanoverian must be considered as an alien. I am, however, no friend to the principle of alien laws at all; and if the ultimate opinion of the profession still settles down in favour of the franchise, I shall be not a little gratified.

I am further requested to say whether, in my opinion, supposing that a Hanoverian, born in Hanover during the reign of George III., were a British subject, the late separation of the sovereignty could affect his rights. Upon this point I quite agree with Dr. Addams and Mr. Craig, and think that a native of Hanover so circumstanced, who, at the time of the separation, adheres to England, can be in no degree affected by anything that has taken place. Even allowing, for the sake of argument, that the separation of the sovereignty by descent made aliens of all Hanoverians adhering to the present king, in the same manner as the separation of the sovereignty, by treaty, made aliens of Americans adhering to the

United States in 1783 (see Doe, dem. *Thomas v. Acklam*, 2 B. and C. 779), still Hanoverians who continue in adherence to the British Government would be clearly within the principle of *Auchmuty v. Mulcaster* (5 B. and C. 775), in which it was decided that an American who continued in adherence to England after the treaty of Paris in 1783, retained all his rights as a British subject.

W. PORTER.

8th February, 1840.

AT THE SOUTH AFRICAN PUBLIC LIBRARY.

[*April*, 1840.]

The Honourable W. PORTER, having been called to the Chair, opened the business, and addressed the meeting as follows :—Gentlemen,—I wish, most unaffectedly, that you had selected some Chairman of more experience than myself. This is the first meeting of the subscribers to the South African Public Library at which I have had an opportunity of being present. I am ignorant of the course of proceeding usual at your assemblies. I am ignorant of the details of the business which you are called together to transact. I am ignorant of the peculiar topics which the existing state of your institution might render most appropriate. Under these circumstances I am, perhaps, affording proof of the inexperience of which I speak, when I thus delay the reading of the Report, and the passing of the necessary Resolutions, by any remarks of mine. It may be, indeed, that I ought firmly to have declined the honour of occupying the place which I now fill. I can, however, say with great sincerity, that it was only because I was deeply impressed with the excellence of this establishment ; because I was anxious—very anxious—to serve it if I could ; and because I was informed that I might serve it by taking the chair upon this occasion (though how it was to be benefited by my doing so I could not, and I cannot, for the life of me, imagine),

that I reluctantly consented to comply with the wish of the committee, and attempt the performance of duties which more than one whom I now see present could discharge much better.

Still, gentlemen, there is a bright side to every thing. The very circumstances which tend in this case to make me a bad advocate, tend to make me a good witness. If I had had any personal concern in the management of this Library ; if I were among the number of those who fostered its infancy, and who have assisted its mature years ; if I had witnessed, as others have, the laying of its foundation stone, or helped, like them, to rear the noble superstructure—then I might be supposed to view with partial eyes what was, in some degree, the work of my own hands, and thus entail some suspicion upon my questionable praise. From all such imputations I stand free. My testimony is perfectly disinterested. In speaking of your institution, I have no temptation to tell anything respecting it save the truth. I may hope, therefore, that my evidence will be looked upon as credible.

Gentlemen, I remember having had a conversation, a few days after my arrival here, with a gentleman whom I chanced to meet at dinner, upon the subject of this Colony in general. “There are some things here,” said he, “of which you may have formed too high an opinion, and which may therefore disappoint you. The climate may disappoint you, when you come to brave a stiff southeaster. The aspect of the country may disappoint you, when you get amidst our interminably sandy flats. But depend upon it there is at least *one* thing at the Cape which will not disappoint you—the *Public Library*.” And most assuredly he was right. When I first entered this room, and beheld the mighty mass of knowledge which is here accumulated, the shelves crowded, too crowded, indeed, if it could be helped, with the choicest works of every age and nation, I felt as if I stood within the precincts of a Library collected in some great metropolis of Europe, rather than in one which had grown up in a few years in the little capital of a thinly populated Colony at the farthest part of Africa !

Gentlemen, the utility of such an institution, at the present day, and to the present audience, needs no formal proof. To enter

upon such proof would be as absurd as to argue the evidences at a missionary meeting. Upon this subject we are, all of us, already in one heart and one mind. If there ever were a time when the spread of information was feared, and hated because it was feared, when the debasing doctrine that ignorance is bliss was accounted sound and orthodox, that time, thank God, is past and gone. About the most expedient modes of accomplishing the great ends in view, men may differ, but I rejoice to know that there is not a class in society, that there is not a party in politics, that there is not a sect in religion, which broadly denies the propriety, nay, which does not loudly inculcate the duty, of dispelling the mists that cloud the eyes of ignorance. This is a cheering and animating fact, full of good omen and high hope. Thus do the paradoxes of one age become the truisms of the next, and thus does light, as is its nature, still "shine more and more unto the perfect day!"

Gentlemen, I should be the last man alive to touch, in such a place as this, upon any disputed topic. But I have no fear that I tread upon debateable ground, that I get within the possibility of controversy, that I utter a sentiment which any man in this company or in this Colony will, for one moment, call in question, when I say that I am, *with heart and soul, and mind and strength, for the instruction of the people—of the whole people—of the people of every age and sex, and class and colour*. I am aware that the connection between morality and education, though a natural is not a necessary one; I am aware that, though "knowledge is power," it may become a power for evil, as well as a power for good. I am aware that the corruption of the best things is sometimes the generation of the worse. But none of these considerations move me. Bad men have made religion the slave of their bad passions, yet for one pang that religion has inflicted, she has assuaged ten thousand. Bad men have made education the slave of their bad passions, but for one crime which education has prompted or facilitated, she has stifled ten thousand in the birth. With a fitting education much may be done for a community; without it, you can do but little.

While I admit the painful but imperative necessity, in the absence of a better check, of deterring from evil by the punishments of the law ; while I admit that those punishments are possibly the more imperative, just because there is no better check ; I have, at the same time, no hesitation in declaring my conviction that after all, and in the long run, it is by the printer, and not by the prosecutor, it is by the *schoolmaster, not by the hangman*, that a moral population must be made. Gentlemen, I know that this Library is not, directly, concerned with the instruction of the lower orders ; but, indirectly, it cannot be without its influence. Everything which raises literature in the estimation of the higher classes in the Colony, everything which spreads amongst those in inferior station a conviction of the advantages of intellectual culture, has an ultimate tendency to benefit the humblest of our fellows, for knowledge naturally gravitates. But, leaving this important topic, need I glance at the benefits, the inestimable benefits, which this Library affords to those more immediately within its reach ? What would your town and neighbourhood become without it ? Were some barbarian enemy—the heavenly Emperor, if you choose—to treat this Library as the Caliph Omar did the famous one of old, at the other extremity of Africa, what would be the result ? You are ten thousand miles, or thereabouts, from the great literary mart of Europe. This being the case, individuals (I am speaking generally, exceptions would of course be found) could neither know what books to get, nor afford the expense of an adequate collection. The public mind would stagnate. Every elevating taste would be extinguished. We should become engrossed by sordid pursuits and vulgar cares. I cannot, in truth, imagine a greater misfortune for this Colony, than the occurrence of any event which should shut the doors of a repository which, by being the Library of the Public, is in fact *the Library of every man in the community*. It is hard to realise an adequate notion of the state to which we should be reduced by such a deprivation. According to the admirable arrangements of this Institution, the circulation of books appears to be a thing as regular, as certain, and as little

liable to be disturbed, as the circulation of the blood. But if, by an effort of imagination, we could transport ourselves from the present to the past ; to the time when the deluge of barbarism by which Europe was inundated had only in some degree subsided, and the dry land but partially appeared ; to the time when the public mind began first to rouse itself like a strong man after sleep ; to the time when Italy, the last to lose the light of the older civilization, the first to hail the dawning of another day, bestirred itself to search for and dig up the fossil remains of ancient intellect out of the beds in which they had been buried ; to the time when a single volume was as valuable as a great estate ; when a manuscript was transferred with more than the ordinary formalities of law, and when the works of a favourite author might be made the subject of solemn treaties ; if, I say, we could transport ourselves, in thought, to such a time as this, and compare the situation even of the great and the learned then, with that in which the humblest individual in this distant and then unthought of territory now are placed, we should know better how to estimate the advantages which, through this great emporium of literature, we, all of us, enjoy. To those by whose exertions this Institution has been rendered what it is, the Cape Public owes a debt of ceaseless gratitude. The work which their hands found to do, they did with all their might, and, verily, they did it well. "The King of Brodignag," says Swift (I quote from memory and not, perhaps, correctly), "the King of Brodignag gave it as his opinion, that the man who caused two blades of grass to grow upon a spot of ground where only one grew before, was of greater benefit to his country than the whole race of politicians put together." Gentlemen, this, surely, is not true, it is only one of those well put fallacies that strike like truth. But if the saying of the great satirist have even a semblance of correctness when applied to him whose efforts are productive only of the grass "which to-day is, and to-morrow is cast into the oven," how much more properly may it be applied to him who causes two ideas to grow in the mind where but one grew before, who labours to make the barren spirit fertile, and sows the immortal seeds of knowledge and of virtue ?

Gentlemen, it is sometimes said by narrow-minded and short-sighted men, and it is oftener thought, perhaps, than said, "this hubbub about books is nonsense. Who is sixpence the richer for all that have been written and read since time began?" Why, gentlemen, even here *wisdom is justified of her children*, for who knows not that the triumphs of speculative science are ever followed by the perfection of the useful arts? Without astronomy, what were navigation? Without chemistry, where were manufacture? To whom is England mainly indebted for her greatness at the present moment? To her statesmen? No. To her warriors? No. She is indebted for it to two men buried for years in the study of science and philosophy, to the Inventor of the Steam Engine and the Inventor of the Power Loom, to JAMES WATT and RICHARD ARKWRIGHT. Even from the misty regions of mental philosophy, substantial gain has been derived. It is a fact which deserves to be remembered, it might serve to rescue such studies from the neglect into which they have too generally fallen, that the science of Political Economy has been the work of metaphysicians. Locke was the first in Europe who wrote rationally about money; and the "Wealth of Nations,"—a work which has influenced the whole commercial legislation of the age,—was not composed by Adam Smith until his intellect had been braced and strengthened by a long continued course of metaphysical gymnastics. But this is stooping miserably. To measure knowledge by its power of money-making were to estimate it by a most unworthy standard. As the Saviour's value was not the thirty pieces of silver for which Judas sold him, so the value of literature and science is not the money for which they may be bartered. Is there any educated man, or half educated man, or any man who has ever read and relished one great work, who does not feel that there is something in literature which wealth could never purchase, and for which no price could furnish an equivalent? Man's chiefest glory, what is that? Doubtless the cultivation of the moral and religious principle, for the neglect of which no merely intellectual acquirements can ever compensate. But next in rank to

this, confessedly the sublimest of man's duties and delights, comes the cultivation of the mental powers. Both well may flourish in the same soil, and that man's mind is a perfect paradise in which learning and piety rise side by side, even as of old the tree of knowledge stood together with the tree of life, twin growths of Eden. When I call to recollection what literature has done for mankind through many an age, the heroism that it has inspired, the enthusiasm that it has kindled, the cares that it has lightened, the sorrows that it has consoled, I hail and bless its beneficent career. Poverty cannot be intolerable to him who possesses, and who knows how to prize, that great treasure, a good book. The pains of a weakly body or a wounded spirit may be alike alleviated by the soothing influence of literature. The wildest passions hear her still small voice and are at rest.

Gentlemen, to some, perhaps, these sentiments may seem exaggerated, if not absurd. But I have little fear that they will so appear to you. How, as I stand, surrounded by those immortal works which are the noblest monuments of noble minds, I may be allowed to testify some portion of the love and reverence which I feel for them, and for the elevating pursuits in which their authors lived and died. That you are animated by the same sentiments I can entertain no doubt. I judge you by your fruits. The Institution within whose walls I speak could only have been produced by such principles carried out into a course of action worthy of them. Those who have raised a temple to literature such as this must have faith in the Divinity to whom it is devoted.

Gentlemen, I have detained you too long, I hasten now to a conclusion. I rejoice to learn from my friend Mr. Jardine, that your affairs are, at present, prosperous. Be instant, I beseech you, in season and out of season, in your efforts to continue that prosperity, or rather to augment it. Preserve unabated your interest in this institution. Believe me you should do so. It is a credit to you. It is a credit to your Colony. Take an honest pride in pointing it out to strangers as a specimen of what the Cape can do, and in making it still better worth being pointed out. Let it be

fixed upon a basis as immovable as the mountain that towers above your town. Labour to make it as enduring as the deathless thoughts of which it is a vast depository. Work a work not for a day, but for all time. Man's merely material labours perish, not so the purer emanations of his mind. The wild beasts of the desert cry in the desolate houses, and dragons in the pleasant palaces of many a Babylon, while the "*thoughts that breathe and words that burn*" of the godlike intellect have imparted of their immortality to the very leaves of the forest.

LIGHTHOUSE AT CAPE L'AGULHAS.

[*July 18th, 1840.*]

On Saturday, the 11th July, 1840, a public meeting was held in the Commercial Exchange, Cape Town, to adopt measures for the erection of a Lighthouse at Cape L'Agulhas, as a safeguard to ships approaching this Colony from India and the East. A numerous attendance of mercantile and nautical men, and the presence of the various foreign consuls and vice-consuls resident in Cape Town, evinced the deep interest which has been at length awakened towards this important object.

The Hon. W. Porter having taken the chair, Mr. E. Norton read the requisition which had been signed and forwarded to His Excellency the Governor, and also His Excellency's answer.

The CHAIRMAN then spoke to the following effect :—Gentlemen, the requisition addressed to the Governor, and His Excellency's authority for holding our assembly, having now been read, it becomes my duty to make a few remarks. I begin by thanking you for the honour which you have done me, by calling upon me to preside over this meeting. It is one collected to promote no object of a sordid or selfish character ; it is collected in the spirit of perfect charity and good will, free from the "barbarous dissonance" of

party spirit, bitterness and strife ; it is collected solely in order that a good work too long delayed may now at length be done. To preside over such a meeting, I feel to be indeed an honour. Gentlemen, I have no sooner thanked you for one favour, than I find it necessary to ask you for another. I have to entreat your kind indulgence towards all deficiencies upon this occasion. Believe me this is no idle affectation. The affectation would be in doing otherwise. I had intended to have mastered and matured, as well as I was able, the subject which we are assembled to consider, and I was anxious, shall I say ambitious? to have made, if I could, such a statement as might do some service to the cause. The pressure of other avocations has destroyed this hope, and I am therefore compelled to throw myself on your forbearance. I do so with unhesitating confidence. And yet, if it be true that to be yourself deeply interested is the great art of interesting others, if it be true that out of the abundance of the heart the mouth speaketh, I feel that I ought not to be quite incompetent to address you upon this question. Gentlemen, it is now three hundred and fifty years ago, or thereabouts, since Bartholemew Diaz first doubled the Cape, and found himself in Algoa Bay. The narrative of his disastrous return—

With darkness and with dangers compassed round—

is familiar to every schoolboy, and we may well conceive, I think, how amidst all the horrors which beset his path, when death in a thousand ghastly shapes still menaced him on every side, a beaming light upon Cape L'Agulhas would have imparted confidence and comfort. It is obvious, notwithstanding, that however much old Diaz might have wished for such a thing, he could not, in that day, have wondered at its absence. But if he could have foreseen the consequences to which his great exploit was finally to lead ; if he could have foreseen the multitude who were, from age to age, to pass along the coast he had discovered ; if all the commerce, with its thousand and ten thousand sails, which was to be afterwards-wafted round the promontory he was leaving, could have been presented to his view ; and if he could, at the same time, have

been told that at the end of three centuries and a half that promontory would stand just as it stood on the day of the creation, that a work of necessity and mercy in which both the east and the west, the old world with which he was himself acquainted, and the new world which his great contemporary Columbus was about to call into existence, were alike interested, should still remain to be accomplished, that, prodigal of property and life, we allowed ship after ship to perish on that fatal spot, for want of an Argand Lamp or two and some reflectors, if such a state of things as this had been prophecied to him, then, indeed, the daring navigator might well have been astonished ! Our case is shortly stated. A glance at any map will show that along the southern coast of Africa one point of land projects beyond the rest, that point is Cape L'Agulhas. On the outward voyage, vessels generally speaking stand considerably to the southward, in order to catch the western breezes, while, on the contrary, it is the interest of all ships homeward bound to keep as close as possible to the coast, so as to be sheltered from the strong winds and heavy seas which, particularly in the winter season, they would otherwise be necessitated to encounter. It so happens that the shore at L'Agulhas, and the whole country for a considerable distance inland, is deceitfully depressed, and that mistakes are made at sea with respect to the true distance and character of the mountains of Swellendam and Caledon. The results have been terrific ; and to put a period, if possible, to the many and melancholy losses at that Ocean Golgotha, Cape L'Agulhas, is the purpose for which we are this day met. I am not quite a twelvemonth in your Colony, and yet since my arrival there have been no fewer than three shipwrecks at this destructive point. I cannot say that I am in possession of sufficient data from which to calculate, with accuracy, the amount of property lost upon these several occasions. But it must have been immense. I am persuaded that I am guilty of no exaggeration, that on the contrary I keep far below the mark, when I assert that the cargo of one vessel alone, the *Northumberland*, would itself have amply sufficed to erect a Lighthouse upon every headland which requires one, round the entire coast from Oliphant's River on the

west to the Keiskamma on the east. It would have built, aye, and maintained for ages, a Lighthouse on L'Agulhas ten times over, and far, far more. Are we to proceed, then, in this miserable penny-wise-but-pound-foolish course, permitting vast properties to be totally destroyed, which might, by so cheap and simple an expedient, be preserved in safety? This speaks to the pockets in language to be understood. Even on the mere question of property and its preservation, economy cries aloud. But another sound is heard, before which all meaner sounds are hushed, for humanity uplifts her mighty voice. Property perishes, and there let it perish if so its owners will, but the piteous, waste of human life, how can we reconcile ourselves to that? Upon this subject it is difficult to dilate, without upon the one hand dealing in cold common-places, or upon the other resorting to wild and passionate declamation. I shall not attempt to do it justice. The silent eloquence of facts which are familiar to every man who hears me, will be the most effective advocacy. Give *you* an understanding to that, to which *I* can give no tongue. The number of human beings who have within the last few years perished at this fatal Cape, is a spectacle at which, if there be tears in heaven, the angels weep. Take one solitary ship, the *Arniston*, or even the *Doncaster*, and if that be true which is vouched by high authority, that none of us liveth to himself, and no man dieth to himself, think, I beseech you, of the melancholy chasm which must have been made in many a heart, by the violent and untimely death of all the sufferers, who then sank to rise no more! In the view of such calamities our common nature seems to realize the pathetic image of Jewish desolation, *Rachael weeping for her children*. Gentlemen, I turn from the dismal sight. I do so to ask, in the name of humanity, and in the name of God, if such things must last for ever? Will men stand tamely by as lookers on whilst so many of their fellow-men are drowning? Poetry has imagined a supernatural being as tenanted that fatal shore, "the Spirit of the Cape." Savage tribes upon the coast of Africa are, we know, in the habit of devoting human victims to such intelligencies. We shudder when we hear or read of barbarity like this. We feel grateful that

our lines are cast in happier places. But if we may be fairly said to cause every evil which we neglect to prevent, it may be well doubted, when we consider the extent of the destruction which periodically takes place at Cape L'Agulhas, whether we have much ground for self-complacency. Our fellow-creatures die in both instances, and die in both instances a miserable death, and, in my opinion, the cruel superstitions of savages and heathens is to the full as excusable as the more destructive indifference of civilized and Christian men. Gentlemen, to proclaim that the continuance of such calamities shall not at least be chargeable to us, is the object for which we are now present. It may be that we shall not succeed. It may be that for the want of a little, and but a little, money this noble project must be given up. It may be that the world will still look coldly on, and see ship after ship, and cargo after cargo, and crew after crew, perish before their eyes. All this is possible. But I do in my conscience believe that, if we take our measures properly, the result will be altogether different. I cannot, and I will not doubt it. You have on your side reason, religion, humanity, and conscience, the calculations of enlightened selfishness, and the dictates of the universal heart of man. With such a cause, these supporters, and God's blessing, believe me, you can never fail. Gentlemen, in the course of yesterday I endeavoured to ascertain on what grounds, if any, the object of this meeting could possibly be opposed. For my own part, I can safely say that I could not imagine what those grounds could be. I should just as soon have expected to hear that it was wrong to keep the commandments, or to clothe the naked, or to feed the hungry, as that it was wrong to raise a light upon Point L'Agulhas, to warn the mariner from danger and from death. I have, however, been able to hear of three objections, and but three, to each of which I shall, with your permission, give a brief consideration. It has been said, then, in the first place, that a lighthouse is unnecessary. The captains of the present day, it seems, do not require such assistance. Lighthouses, it is conceived, are vulgar, old-fashioned affairs, the clumsy, but convenient, mode of other times for counteracting ignorance, and fit enough perhaps, even now,

to show small craft the way of creeping round a coast, but objects of derision to the superior seamanship which, in the present day, conducts the Eastern trade. Gentlemen, I trust that I am very far from undervaluing the mercantile navy of either Europe or America. That the commanders in that navy are, at the present moment, a credit to their respective flags, I entertain no doubt whatever. But that these commanders are now, or are likely to be hereafter, so skilful as to be beyond the benefit of a beacon light upon Cape L'Agulhas, or that such skill is in point of fact attainable, considering the mode in which two great commingling oceans affect the current in that quarter, I respectfully deny. And even were we to admit that there is a class of ships which may be independent of the humble aid we would afford,—ships with infallible chronometers, and in which the sextant itself has been discarded for instruments of still greater accuracy,—would it therefore follow that there are not other vessels, aye, and many of them, which would hail with joy the useful light? But in truth the object is absurd in principle, and is refuted by the state of facts. I say the objection is absurd in principle, and I say so for this reason. It is not denied—and I believe it cannot be denied—that Cape L'Agulhas, upon every consideration applicable to such a subject, requires a lighthouse as much as any other point or spot with which we are acquainted. Now, if you tell me that a beacon on L'Agulhas is unnecessary, then I say, “put out the Channel Lights, why waste the precious oil? If seamen should require no aids of that description, darken every lighthouse in existence, you may do so with safety.” Few persons, however, will, I think, be bold enough to advocate this sweeping proposition. I say, moreover, that the objection is refuted by the state of facts. We hear of seamanship, indeed, but we see the shipwrecks. Driven by no tempest and shattered by no storm, still bark after bark is betrayed by that deceptive shore, and I hold it to be preposterous to talk about a speculative perfection, while the work of destruction is going practically on. The second objection to our meeting differ, altogether from the first. It freely admits that a lighthouse would be useful. It even strongly contends that a lighthouse should be built. But it says in substance this : “this question is an important question,

but it is not a colonial question. It belongs to those who own the ships to make arrangements for protecting them. If British and Foreign ship-owners are content that their property should be continually perilled, and the passengers stand in jeopardy every hour, this Colony may well be content also. Why should we meddle or make with what concerns other people, and what does not concern us ?" Gentlemen, it is true that the Colony of the Cape has apparently but a small interest in the accomplishment of the work in view. The vessels which are wrecked are not the property of our ship-owners. The merchandize which is lost is not consigned to our merchants. The lives which are sacrificed, for the most part, make desolate other homes and hearths than those belonging to this Colony. The loss of one vessel has been felt in England, India has mourned it may be for a second, a third perhaps has raised a universal wail throughout the whole of the Mauritius, other quarters may be reached in turn, but from such visitations, owing to circumstances, this Colony is exempt. All this is true. But while I admit that all this is true, I still contend that it is our interest as well as our duty to stand forward. Surely it needs no argument to prove that everything which conduces to the security and prosperity of the great Eastern trade must be advantageous to the Cape ? We have an interest, if we must consider the matter in this way, that our Indian visitors should not fear a voyage to the Cape, more than a voyage to Australia. But if I am asked the true reason why you should come forward in such numbers as I see to-day, I would answer, that you so came forward because, enforced by strong necessity, you cannot help it. The disastrous spot is in our territory. The harrowing scenes which it presents are forced upon our notice. The dreadful nuisance which we would abate lies at our very doors. Our own eyes, so to speak, behold the wretched sufferers, the men and the women, and alas ! the little children too, struggling for life and sinking in the wave. Our own ears are pierced with the appalling cries which nature prompts in that awful hour of nature's agony. Our own hands perform the sickening task of collecting upon the sea-beach the bodies of the dead. Have we no interest, I ask, in terminating if we can such miserable doings ? Interest

indeed ! Why what interest had Woltemade—let me do honour to a brave man's memory, and thank the gentleman opposite (Mr. Silberbauer) for having brought a most noble action to my notice—what interest had Woltemade, which prompted him to peril and to lose his life in the manner which the historian has recorded ? I thought I had in my pocket the paper which transcribes the incident, but I find I have forgotten it. The story, however, is soon told. On the first of June, 1773, an Indiaman, of which I do not know the name, was wrecked somewhere off your coast. When the crew and passengers were in the last extremity, Woltemade arrived on horseback at the spot, and determined to save as many as he could, he swam his horse seven times through the breakers, and succeeded upon each occasion in bringing off with him two men. Worn out with anxiety and toil, Woltemade was inclined to pause, but still the cry for help came upon him from the wreck, and unable to endure that cry, exhausted as he was he sprang once more into the saddle, and spurred his tired horse again into the surf. He reached the vessel, though with difficulty, but there, alas ! too great a number, in the selfishness of suffering, fastened themselves upon their deliverer, and all perished ! That was a great deed, gentlemen, a deed of deathless glory. I am disposed to think that the doer of it took a different view respecting what should interest him, than some amongst us seem inclined to entertain. He had not sixpence worth of property on board that ship, nor was there a single person on her deck of whom he had ever seen the face. But he acted upon other principles. He knew nothing, I presume, of the Roman Drama, nor, in all probability, did he ever hear the hacknied line of which the fine philanthropy excited the enthusiasm of a heathen audience ; but though ignorant of classic lore, he was well acquainted doubtless with a better learning, and he had pondered perhaps upon the question “ who is my neighbour ? ” and he had laid up in his heart the simple beauty of the parable which gives the memorable answer. God had given him a generous and heroic spirit, and he obeyed its dictates even to the death. None of us, gentlemen, is likely to be placed in such extremity as was this gallant colonist. None of us is ever

likely to be called upon to do such services or to make such sacrifices. But still, in an humble and inferior measure, we may feel something of the spirit by which he was imbued. If everyone now within hearing of my voice, and everyone of perhaps the greater number who may chance to see hereafter some account of what I say, would only hear an inward voice proclaiming "go thou and do likewise," why, gentlemen, in two years your lighthouse would be built and burning! Gentlemen, the only objection which now remains to be disposed of is certainly a fatal one, if valid. Our hopes, it is said, are doomed to be shipwrecked on L'Agulhas. I have been asked to name the sum which will probably be required for effecting the purpose now in view. In answer, I have named a sum considerably more than we can need. I have named, in round numbers, £10,000 as the sum which will suffice to build a lighthouse fit to last for ever, and also to defray all charges as long as it shall last. The reply to this announcement has been the usual shrugging of shoulders, and the usual shaking of the head, and the usual prophecy: "You will never raise the money." Gentlemen, I venture to prophesy that this prophecy is false. I am not, indeed, absurd enough to think that £10,000, or anything like it, can be collected in this Colony. We are neither numerous enough nor rich enough for such an undertaking. To expect that the Cape of Good Hope should build this lighthouse, would not be just if it were practicable, and would not be practicable if it were just. But I will not be persuaded, until we shall have tried, and fairly tried, and after all have failed, that if we can forward with unanimity, with earnestness, and according to our means with liberality we shall not be powerfully supported from abroad. For just consider how the matter stands. Examine the map of the world from North to South, from East to West, and you will find that there is not a spot upon the face of God's earth, where it is for the interest of so many different nations that a lighthouse should be built, as upon the very spot in question, Cape L'Aguihas. I hold this to be indisputable, and see the cheering results to which it almost necessarily leads. Why, £10,000 might easily, if you had only the fit machinery to work with, be raised in half a dozen towns which might

be mentioned, while instead of towns there are far more than that number of great nations to whom, through their consuls here (who all take a lively interest in the subject), we may confidently appeal. What we have to contend against is, the diminishing effect of distance. Our task must be to counteract this tendency as much as possible ; to bring the distant near ; to secure, if we can, the services of some zealous spirits, who will not like to let their fellow creatures perish, even so far off as L'Agulhas. Such spirits, I believe, may still be found. Details, however, will be for your Committee, and with them I shall not meddle. But it is amazing to think how differently we are affected by a matter which takes place beside us, and one which chances to occur five or six thousand miles away. A wherry upset upon the Thames, by which a single waterman is drowned, will cause as great a sensation throughout wide London's bounds, as the destruction at Cape L'Agulhas of a vessel of 1,000 tons with all her passengers and crew. Tell the people abroad, tell for instance the people of England, to make the case their own. Transfer the dangers and disasters of Cape L'Agulhas to some head-land on the British coast. Will any man tell me that that head-land would be left unprotected by a light ? Why, knowing as I do, and honouring as I do, the majestic charity, the sublime benevolence of London, I have no more doubt than I have of my own existence, that within forty-eight hours after the tidings that the *Arniston* was lost with 400 souls that freighted her had reached that royal city, not £10,000, but if necessary £50,000, would have been subscribed to raise a lighthouse at the scene of death. What is true of London will equally apply elsewhere. Let us lay the case before them ; it is a case emphatically of life and death ; let us call on them to help us, or, I should rather say, to help themselves, and leave the rest to God and their own consciences. Gentlemen, from the Colonial Government, under the circumstances in which it is placed, it would be unreasonable to expect assistance. Whether or not the Government at home will aid us, it is not for me to judge. Perhaps it may be thought that the substance of a recent despatch, in relation to a somewhat kindred subject, does not augur favourably. It appears that some

time ago, Admiral Elliot was strongly impressed with the importance of having a minute survey made of our south-eastern coast, and Sir George Napier, taking as he does a warm and anxious interest in all such matters, wrote earnestly home upon the subject. By the reply which has been received, it appears that the Admiralty were of opinion, after considering the subject, that there were but two places between Simon's Bay and Port Natal in which a small craft could ride, and they came to the conclusion that the proposed undertaking would be useless. From this, of course, it by no means follows that the Home Government will not enter into our views about L'Agulhas. For my own part I hope and believe they will. But on a great question of this kind, I "put not my trust in Princes," nor yet in Prime Ministers, but in the universal people. If our Governors should want the will to aid this work, which is impossible, or if, having the will, they should want the power, which may turn out to be the case why then, we have nothing for it but to do the work without them. But while I feel myself justified in saying this, I must, at the same time, say that I look with confidence for better things. Gentlemen, one word as to the work itself. You all know the ease and cheapness with which it can be carried on. My honourable friend near me (Mr. Breda), the proprietor of the property, gives you the ground as a free gift. Major Michell, the Surveyor-General, has made a plan and estimate, and he had proposed to add to these his gratuitous services as architect, services of which, owing to other arrangements, we shall not in all probability be able to enjoy the benefit. I need not dwell upon the claim which the gentlemen I have mentioned possess upon the public gratitude. But it is not by man alone we are assisted, for the very nature of the plan appears to afford us its co-operation. Stone for building purposes is plenty on the spot, and there is an elevation of solid limestone ready to receive the edifice which we propose to raise. Gentlemen, I have detained you long. I have now done. There is but one thing more which I would say to you. Do not yield to little difficulties and discouragements. You will meet these things, and meeting them you must overcome them. Do not expect that in every quarter you will at once arouse

indifference, or look for it that men will be able everywhere to trample selfishness beneath their feet. Lighthouses are not things which rise like exhalations. I have myself looked from shipboard upon the Eddystone at night. I would fain derive a moral from what has occurred upon the site of that celebrated structure. To surmount all the difficulties which nature there presented in such numbers, and found a lighthouse in the very waves might well have seemed a vain and visionary notion. But still the noble thought was not abandoned. Winstanley strove to realize it, but the savage sea, lashed into fury, as if by the attempt to deprive it of its prey, sprang on its victim, like a thing of life, and in a night laid prostrate the workman and his work. But still the noble thought was not abandoned. Rudgerd next essayed his skill, and then, as if the two great destructive elements of nature had made a compact and alliance, fire came to succour and avenge the baffled ocean, and the finished building was consumed. But still the noble thought was not abandoned, Smeaton finally arose, and he triumphed gloriously, and there his mighty labour stands, firm as the rock into which it is inserted ; destined, for many an age, to smile superior to every storm, and defy the surges of a thousand years. Your obstacles are of a widely different description ; but, such as they are, encounter them with the same determination, and they, too, will be overcome. Send far and wide over the deep your philanthropic summons. There is, it seems, in the neighbourhood of Cape L'Agulhas a certain spot termed the Tower of Babel. The tower which bore that name of old was begun by one people who spoke one speech, but idle if not impious in its object, the building failed in consequence of disunion, for the language of the builders was confounded. Let us hope to lay the first stone of a tower to be commenced under other auspices, and for other objects ; a tower for the erection of which many different tongues and nations shall combine in fellowship and concord ; a tower to be raised by those who are of one heart, if not of one dialect ; a tower to which the mariner can look in his extremity, and by which, long after we ourselves have passed away, the blessing of those who were ready to perish may be gratefully called forth.

The Hon. Mr. BREDÁ said :—It may appear strange that a farmer should rise to move the first resolution on such a subject, but although neither interested in shipping nor commerce, I cannot but look upon the object which this meeting is assembled to promote as one of importance to every inhabitant, not only of Cape Town but the whole Colony at large ; and I feel especially called upon to come forward on this occasion, as most of the disasters referred to in this resolution have occurred on the coast in the neighbourhood of my own dwelling ; and I have been painfully called on to witness, with my own eyes, ship after ship cast away, valuable cargoes strewn along the beach, and hundreds of human beings at a time washed up dead upon the shore. There was the *Arniston* on the 13th of July, 1819, a total wreck ; when out of 365 persons on board, only five escaped. No less than 360 dead bodies of men and women and children were washed on shore, and, what is more, they lay there a week, before any man knew their fate. I saw them, gentlemen, with my own eyes, torn and partly devoured by the preying vultures. Had a lighthouse been near, this accident would probably not have happened, as the *Arniston* went ashore in the night. The second was the *Martha*, and third and fourth the *Jessie* and the *Linus*, when numbers also perished. Then came the *Doncaster* with fifty or sixty men, women, and children, who were all drowned, and washed on shore mutilated ; and then we saw that noble property the *Duke of Northumberland* wrecked and totally lost. The *Venerable* followed ; and a French vessel the *La Lise* also miserably perished, the captain, a gentleman, the proprietor of the vessel and cargo, with his wife and children, the whole number of passengers, and one half of the crew, drowned and washed on shore in a mutilated state. At these last wrecks I was not present, but the letter of my son, who was on the spot, describes scenes such as I hope I shall never witness ; and let me now indulge the hope, that by the measures to be adopted by this meeting, a stop will be put to the destruction of human life and valuable ships upon Cape L'Agulhas, and that I shall thus be relieved from the painful sight of dead bodies, so frequently washed up on my property.

Mr. ANDSDÉLL, in moving the second resolution, remarked that, in

the case of the *Arniston*, where all on board, as Mr. Breda had stated, had been lost except five, and a week passed before the circumstances became known, had a lighthouse keeper and family been on the spot, even although the wreck might not have been prevented, yet several of the sufferers could, probably, have been saved ; as it is not unlikely that some reached the shore alive and perished miserably for want of timely assistance.

The following communication was presented to the meeting from M. De Lettre, French Consul :—

“ Cape Town, Cape of Good Hope,
July 12th, 1840.

“ Gentlemen,—The melancholy feelings which every sympathizing mind must experience on learning the accounts of various shipwrecks which have taken place during a very short space of time, on the rocks at the point of Cape Agulhas ; the poignant sorrow of the families of the victims who have perished ; and also the cargoes swallowed up by the sea, to the great injury of various persons interested in the shipwrecked vessels, are sufficient to prove the absolute necessity for erecting a lighthouse of large dimensions at that station, as well as providing accurate instructions for the guidance of the captains of vessels which annually frequent the coast, and to endeavour to prevent a recurrence of the same misfortunes. I take upon myself (in accordance with the resolution you are about to pass on the subject) to transmit immediately the prospectuses to their Excellencies the Ministers of France and to the Governor of Bourbon and Pondicherry, requesting them to circulate these papers among the commercial houses and assurance companies of their respective countries, for the purpose of encouraging them to subscribe a certain amount, in order to assist in meeting the expense which the erection of such an edifice will incur.

“ At the same time I submit to you, gentlemen, the propriety of addressing a vote of thanks to Mr. Silberbauer, for the indefatigable zeal he has manifested in this affair, with the hope of conducting the project to a happy issue ; as also of giving him some mark of

public acknowledgment of his assiduity in discharging the office of agent of commerce in this town.

“(Signed) F. DE LETTRE,
“French Consul at the Cape of Good Hope.”

Mr. MERRINGTON said, as he might not have an opportunity of making the suggestion to the committee, he would now mention an idea that had occurred to him during the eloquent address to which they had all listened with so much pleasure. With such a powerful appeal to humanity, he thought they might derive much assistance in their object, by making the proposed lighthouse also a monument to humanity. It was well known with what a warmth of interest the public regard the effort making to put an end to the slave trade, and he considered this a fitting opportunity for commemorating Mr. Clarkson's labours in this respect, by making the lighthouse at Cape L'Agulhas a Clarkson Monument.

Mr. BORRADAILE begged to enquire whether any gentleman present could give any account of the money which had been subscribed to erect a monument to the late Captain Horsburgh? If that fund were not already disposed of, he knew no spot more suitable than Cape L'Agulhas on which to place a tribute to the memory of that singularly meritorious individual.

Mr. STEIN regretted the absence of Colonel Michell, who, he believed, could give some information respecting that fund, having had several interviews on the subject, in the year 1838, with Mr. Borradaile, sen., and the Cape Trade Society. He believed the spot then deemed most suitable for the erection of a monument to Captain Horsburgh, was somewhere in the China Seas.

The CHAIRMAN said it would certainly be the duty of the committee now appointed, to put themselves in communication with the parties who had raised such a fund, and to make any necessary enquiries as to whether this suggestion could be carried into effect. He was not sufficiently acquainted with the career of the distinguished man who had been named, to say whether the China Seas or Cape L'Agulhas would be the most fitting situation for this monument; but he considered that nothing could be more fitting

than that utility should be combined with the monument of such a man. Where this principle is overlooked in the erection of monuments, they are likely to be regarded with less respect. He remembered one near Dublin, which, being fit for no purpose whatever, is commonly pointed out as an overgrown milestone. But if every man who traverses the ocean around that destructive Cape, besides enjoying the benefit of a light, could also have his mind refreshed by a remembrance of the services of an illustrious individual, no more fitting opportunity could probably be found for the employment of any fund that may have been raised for erecting a testimony of respect to his memory.

The resolutions submitted to the meeting having been unanimously adopted, and the chair vacated, Mr. Simpson was called to preside, and a hearty vote of thanks was given to the Hon. Mr. Porter for his able conduct in the chair.

Mr. PORTER said he could only conclude as he commenced, by saying that the compliment was all on the side of the meeting. He considered that in calling him to preside on that occasion, they had done him a very great honour, and if their efforts were successful, and a lighthouse erected, he would, to the last hour of his life, count it a high distinction to have been in the chair of so useful a meeting.

ON THE INSOLVENT LAW.

[Supreme Court, Wednesday, July 15th, 1840.]

The ATTORNEY-GENERAL said :—On a subject respecting which he had so much to say in a proper place, he now felt almost disposed to reserve himself entirely, as it was his intention, as soon as other duties would admit, to communicate with the Governor, and obtain a special meeting of the Legislative Council, where, taking as he did

a deep interest in the subject, he would endeavour in conjunction with his learned friend (Mr. Cloete), then no longer professionally opposed, to give the entire insolvent law as well as the question of preferent bonds a full and complete discussion ; depending for its promulgation on the liberality of the public press. He would only say that at present it is not sufficient that £10, £20, or £100,000 be traced to have been in the possession of an insolvent within a given period. Nor could he (the Attorney-General) call on the Court to convict any man on merely tracing any amount to his hands and there closing the case. He considered it would be hard to subject a man who, through ignorance, has kept no books, to the necessity of accounting for the last farthing, under pain of a punishment which the law has reserved for the most heinous crimes. There were other considerations, which he would take an early opportunity of throwing before the public.

ON IMMIGRATION.

[*Legislative Council, Wednesday, May 13th, 1840.*]

The ATTORNEY-GENERAL said :—It appeared to him there was no difference of opinion among them as to the abstract question. All were agreed that there is a want of labour in the colony, and all were desirous of having that want supplied. But in life it is always found that to be sensible of our wants is the easiest thing in the world ; what men trouble their heads and hands about is to supply them. He was always opposed to throwing cold water upon noble projects, as he considered that to attempt more than could be accomplished is always better than to stand still and do nothing. At the same time we should not shut our eyes to the difficulties of the position in which we are really placed. With regard to the great question of Emigration, as an Irishman, coming from a country where he had seen the utmost excess of misery arising from the

circumstance of there being more hands than can possibly obtain employment, to a country where he found there was such great difficulty in obtaining hands, and such inconvenience and diminution of happiness experienced from the want of persons to act as servants, he should surely be as much disposed as any man to adopt measures which would yield relief to the one class, while they would bring prosperity to another. He had not had an opportunity of seeing the Colonial Gazette, from which such repeated extracts had been made, but he thought it might be fairly inferred that what the Ministry at home must have chiefly before them in promoting Emigration, must be to relieve the pressure of the population there. He considered it probable that an English Minister would chiefly look to this, not, however, that he would necessarily shut his eyes either to the benefits conferred upon those who are thus brought from circumstances of distress into a country where they will have a fair and open field for their industry, or upon the colonists who are thus supplied with necessary labour ; but the great and animating purpose of the ministers who promoted Emigration, must obviously be to relieve the distress of population at home. Now he thought that this consideration, taken in connexion with what was stated by the Colonial Secretary, had some bearing on the question before the Council, as showing that the Colony was not likely to derive so much benefit from the measure now proposed, as everyone, he was certain, although he might not anticipate, must heartily wish. This Colony never has been a Colony chosen for Emigration from England ; the tide of Emigration has flowed towards Canada and Australia, but it has never set strongly towards this Colony. He would observe in passing that hitherto the Emigration from England and Ireland had not been of the right sort. The general class of Emigrants have been small capitalists, who have sold their farms or other property to pay their transport, and who are enabled to go to work on their own means on reaching their destination. By this species of Emigration the Home country could have been but very slightly, if at all, benefited ; for if it be true that it is advantageous for a country to have the amount of capital bearing a certain proportion to the amount of

labour, then the system which will diminish the number of labouring hands and diminish the amount of capital at the same time, and in a greater proportion, does not ultimately do any good. Now the present plan is, to do the very thing which is wanted at home, and is equally wanted here, and that is, to raise a fund to bring out people who cannot bring themselves. But it is to be expected that the stream of gratuitous Emigration which Government will set in action will follow the voluntary stream, and therefore that the Cape will profit less by the measure than Australia and the two Canadas. The amount of English capital which has been transmitted to these colonies is immense; and it is to be expected that the English Minister will act on the principle of sending the pauper after the capitalist, and that it will appear to him that the Cape is not the best place for gratuitous Emigration, seeing that voluntary Emigrants have generally chosen the other Colonies. The feeling would perhaps be different if the object of the Ministry were to relieve the colonists, and not to relieve themselves of the pressure of the home population; they would then examine and find that this Colony is in urgent want of hands; but if their object also were to benefit the pauper they might still consider this Colony as a place where industry and capital are not so likely to be adequately remunerated. Talking then of waste lands, he knew it to be the opinion of his hon. friend on the extreme right (Mr. Ross) that the proceeds of the sale of such lands should be expended in the formation of good roads; and he must acknowledge that in his own opinion roads should take precedence of every other object; for a country without roads is as a body without veins or arteries to give circulation to the fluids which support life. The sum requisite to bring out each Emigrant might, he thought, be about £15; but say it were only £10. To bring out 1,000 paupers, therefore, would require £10,000, and he considered that, in the present position of the Colony, that sum, if realized from the sale of waste lands, might be much more beneficially expended in the formation of roads and other local improvements, which would bring the Colony into such a state that the stream of spontaneous Emigration would be likely to flow towards it. Although, however, he felt there was something peculiar in the

position of the Colony which rendered it unlikely that anything effective would be accomplished by it, he highly approved of the principles thrown out in the extracts which had been read from the instructions to the Land and Emigration Board, and he would give his cordial assent to an expression of the Council's opinion as to the soundness of those principles ; but he considered he should be quite uncandid to the Council and to the Colony, were he not to state his opinion that, until by forming good roads, and making other internal improvements, the tide of voluntary Emigration shall be attracted to these shores, no practical measure of utility is likely just now to follow from this resolution.

ON A PAPER CURRENCY.

[*Legislative Council, Monday, August 24th, 1840.*]

THE ATTORNEY-GENERAL :—It is not my intention to enter just now upon anything which can be called an argument. I wish, however, to state, without reasoning upon them, three things which were suggested by the able speech of my hon. friend on the extreme left (Mr. Ebdon), and which I think have some bearing on the matter now in hand. In the first place, I wish to say that, with scarcely any modification, I adopt the general propositions which have been advocated by my hon. friend ; but I conceive that those general propositions, though very true, bear but slightly upon the immediate question now before the Committee. That question is not whether our existing currency is the best imaginable currency, but whether it is not desirable, in the present state of the Colony, to employ some £50,000 or £60,000 in public works, rather than to employ that sum in the destruction of the same amount in paper money, it being clear that the notes so to be burned would be a certain sacrifice for the purpose of letting in some better circulating medium ; and it being in a great degree doubtful whether that sacrifice would

have the anticipated effect. In the second place, I would say that there is no witchery in a paper currency convertible into gold at the will of the holder. It is very clear, and has been proved, that the value of a paper may be maintained on a par with gold without being convertible into gold. Convertibility is not a good thing considered in itself; on the contrary, by creating a necessity on the part of paper issuers for having at all times a quantity of unemployed specie lying by them, it is considered, in itself, an evil. This evil, however, is the price paid in England and elsewhere for the most obvious means of checking over-issues. Now, as far as the Government paper money of this Colony is concerned, this, the great use and object of convertibility, does not exist; for everyone knows that any further issues of Government paper are quite out of the question. In the third place, I wish to say that in fact the Government paper is, as it appears to me, convertible into gold at the will of the holder. Would my hon. friend derive a paper currency for this Colony which should be payable in gold at every drostdy in the Colony, at Graham's Town, at Graaff-Reinet? (No, no, from Mr. Ebdén.) Well, then, as the Graham's Town holder is concerned, the only difference between the present paper currency and that with which my hon. friend would supply its place, is this, that now he gets his gold in London (by means of a Treasury bill), and that then he would get his gold in Cape Town. Is there any essential or philosophical difference? I think no difference in principle exists, and the practical effect of the slight difficulty thus interposed is beneficial rather than otherwise, as it tends to keep the paper steady, and like the small premium on coining gold at the Mint, to prevent people from rushing in with large quantities unnecessarily. When the commercial relations between England and this Colony are taken into account, I consider that for all practical purposes gold in London is just the same as gold in Cape Town. So long as Government paper procures Treasury bills at one and a half per cent., so long any man who has £100 can always be able to get from somebody else 100 sovereigns for it; and thus it will virtually be convertible at pleasure. I shall not seek to draw any inferences from these positions, or to apply them directly by way of answer to a good deal of what

my hon. friend has said ; but I do not think that, if maturely weighed, they will serve to show that the evils of present paper currency have been by my hon. friend not a little exaggerated.

Mr. ROSS :—With the observations which have just been made by my hon. friend, I quite agree ; but no mention has been made of the uncertainty that exists how this money is to be applied. I take it for granted that it shall be *bonâ fide* specified in the body of the report for what objects the re-issue is to be made, and that those objects shall be new ones, for which the revenue is clearly inapplicable.

Mr. EBDEN :—It was no more than I expected that my hon. friend (the Attorney-General) should give his assent to the general principles I have humbly endeavoured to advocate. But I would beg to ask how he gets over the difficulty arising from the absence of all pledge or promise to pay, in seeking a remedy against the issuers ?

ATTORNEY-GENERAL :—I do not enter on that question now. The objection is merely technical ; it is nothing in practice.

Mr. EBDEN :—It is admitted that no State ever possessed the power to issue paper money to any amount without abusing it.

ATTORNEY-GENERAL :—But my hon. friend has heard in the memorandum of the Secretary to Government, that no idea is entertained of any further issue, that it is “utterly out of the question.”

ON THE SAME SUBJECT.

[Legislative Council, Thursday, August 27th, 1840.]

The ATTORNEY-GENERAL :—It was not my intention to trouble Your Excellency with any remarks to-day, as almost every topic connected with these resolutions has been so fully discussed in committee ; but my hon. friend having called Your Excellency's attention to three of the resolutions which we had under consideration, and

thrown out some suggestions which certainly are, as the American newspapers say when they are about to make some doubtful statement, "important if true," I think it necessary to make a few remarks on the subject of those particular resolutions. With regard to the 7th, which my hon. friend seems to regard as supererogatory, I must confess that I regard it as exceedingly important that we should make a statement of the interpretation we put upon the documents, which my hon. friend deems so equivocal. For what will be said by the Home Government, and what has been said by many in the Colony, as alluded to by the hon. Secretary to Government? That since 1825 this Government has had reiterated orders to withdraw the paper money, which, with culpable neglect of its bounden duty, it has neglected to do. Now it is very important to state to the Home Government that this is altogether a misrepresentation. We assert in the previous resolution that "the Home Government have selected a particular result of their own arrangements, and at a time unfavourable to the Colony, to withdraw the paper money, &c." But if the Home Government can say, "we told you to withdraw that money in 1825; look at the letter to Mr. Under Secretary Wilmot Horton, and look at the Treasury minute; have we not, instead of selecting an opportunity, given you fifteen years' notice during which period we have sent you out reiterated orders to destroy that paper money?" instead of this resolution then being supererogatory, its omission would be "worse than a crime," as Fouché has it, "it would be a blunder." When you tell a man who has written anything that you attach to it a meaning different from what he intended to convey, he may be incensed at your impudence, and if it appeared that you had not read it attentively, you would certainly not recommend yourself to his favourable consideration. This Council might not perhaps be chargeable with ignorance or impudence, but rather with a beautiful combination of both. Looking at these two documents, what would be the construction put upon them by the Supreme Court, with reference to the intentions of the parties? This is a mere question of language, and had the resolution confined itself to saying that, on an attentive consideration, we cannot find that the Home Government have

“expressed” an intention to withdraw that paper money, it might have been better. The word “entertained” is surplusage, as, whatever means my hon. friend (Mr. Ebdon) may have had of knowing the sentiments entertained by the Lords of the Treasury in 1825, we can have no means of coming to such a knowledge but by the terms of their minute, yet putting ourselves, as far as their language enables us, in their places, we may say safely that no such intention was ever entertained. Now, upon the probabilities, does it not appear extraordinary that this letter and Treasury minute were written at a time when this paper currency was just emerging from its chrysalis rix-dollar state into what my hon. friend (Mr. Ebdon) would call its present butterfly form, in these sterling promissory notes? And is it not singular that in destroying the old paper and sending out the new notes, the Home Government did not send out some such message as this, “We beg your attention to the Treasury minute, by which we directed the speedy extinction of this paper money, instead of which you are making it renew its youth as the eagle. We must have a full explanation why this is necessary, and above all we must have an alteration of the principle on which it at present circulates.” Now, although I have no access to the documents, my hon. friend the Secretary to Government, whose accuracy of statement is unimpeached, and whose means of knowledge are perfect, has informed us that such directions were never given, and consequently never reiterated.

SECRETARY TO GOVERNMENT :—Certainly not.

ATTORNEY-GENERAL :—Then if your view of the Treasury minute is correct, it was the most natural thing in the world that such a declaration should be made.

SECRETARY TO GOVERNMENT :—Pardon me for interrupting you a moment to state that, during our wordy discussion in committee, I pointedly mentioned the circumstance that the Home Government actually sent a considerable amount of notes which could never get into the military chest, being only made receivable in payment of taxes. Judge, after that, how far there was an intention to redeem this paper money.

ATTORNEY-GENERAL :—I am glad the fact has been again elicited. It appears, then, that the Home Government, in sending out notes to replace the old rix-dollar circulation, made a portion of those notes bear terms involving an indefinite extent of duration ; which is another argument with respect to their intentions. Coming now to their language in page 11, following the passage which has been read and relied on by my hon. friend (Mr. Ross), and on which a word by-and-bye, we find “ as a part of those rix-dollars were issued by a Government establishment, called the Lombard Bank, upon various securities, the sums which may from time to time be paid upon these securities should be applied towards the liquidation of this paper money.” We do not deny that. My hon. friend opposite has indeed contended that the Home Government should pay the whole, but the cancelled repayments would clearly be a reduction of the amount. It is not even Lord John Russell’s intention that the whole amount should now be redeemed, but only such portions of the sums which have been transferred from the Discount Bank to the Colonial Treasury, as might not be required for the transactions of the Bank. The passage relied upon by my hon. friend (Mr. Ross) is in substance this, that every £103 of notes taken in exchange for £100 Treasury bills should be not re-issued, but remitted to England as vouchers for the bill sent, and there destroyed. From this my hon. friend argues, that all the paper money that got into the commissariat chest should be withdrawn from the circulation. But is it not evident that the object of the Home Government in this Treasury minute was to get rid of a depreciated currency ? Was it not clearly intended to create a reservoir into which the redundancy should flow ? Was not their language in effect this : “ Your paper is redundant, now we open a way for the escape of the redundancy, and when it has been removed, the remainder will outstand at its full value.” That such was their intention there can be no doubt. There is nothing in the machinery they employed that can indicate their having had a view to ultimate extinction. They say there is in the measure “ nothing compulsory,” and indeed their whole subsequent procedure proves that their only intention was to get rid of the redun-

dancy which had given rise to the depreciation. But there was a point at which, the equilibrium being restored, the public would seek to retain the remainder of the paper as a means for making remittances. That point gained the redundancy disappeared, and the remaining paper becomes a solid and fixed circulation equal in value to gold. But the reasoning of my hon. friend (Mr. Ebdon) goes upon the notion—I will not call it “a crotchet,” as he does not like to have it said that he entertains crotchets—his reasoning is founded upon the notion that convertibility is an essential condition of every currency. I now join issue with him on that point, and undertake to give him the first economic authorities in support of the position that convertibility into gold is not at all necessary to maintain paper on a level with gold; and that it is quite possible for every pound note of such inconvertible paper to maintain the value of a sovereign. To prove this it is only necessary to glance into history. At the time that Mr. Pitt’s bill was passed, four years elapsed before there was the slightest depreciation of the currency; and it was not until the Bank rushed on to unlimited issue, and poured a further mass of paper into the market, that it began to depreciate, and fell to the point to which my hon. friend has alluded, when the guinea was equal to £1 11s. 6d. But for four years the value of the paper remained unimpaired; which shows that the value of a paper currency is not alone determined by its convertibility; but that a restriction on over-issue is sufficient to prevent depreciation. I wish I had a copy of McCulloch here to quote the passage, as I would press the matter a little further with my hon. friend on my left (Mr. Ebdon). His great cry, put forth with as much ability as perseverance, has been, “Give us a paper currency convertible into gold at the will of the holder.” Now, I have always regarded the convertibility of paper into gold as an evil instead of a good; because the issuer is under the necessity of keeping in his coffers, of no use to any mortal, a quantity of gold which might as well be at the bottom of the sea, and which, but for that necessity, would be employed in the transactions of productive industry. But this is the price paid in England for a

greater advantage. It serves to prevent the issuers from acting as the Bank of England did on the occasion to which I have referred, that is, from inundating the market with notes so as to disorder contracts, and produce other inconveniences. There is thus a balance of evils, and beyond doubt that arising from convertibility is the least. But does this apply to the Government money of this Colony? No man here dreams of another pound note being issued. If I were speaking in another place and under other circumstances, I might call out for convertibility; but in this Colony there can be no use in raising such a cry, seeing that the sole object of convertibility is an object you have already gained. Returning, then, to the views of my hon. and learned friend on the other side, we take upon us to express our sense of these two documents; and we find in the letter of Mr. Herries the remarkable expressions which were read by the hon. Collector of Customs, and which I shall here read again, as they go the whole length of the position I shall have laid down. He goes on to say: "But for the sake of remedying the inconveniences occasioned to the Colony by the fluctuating value and increasing depreciation of this paper currency, the Treasury thought it right that the mother country should make the sacrifice of providing such a quantity of metallic money as might be necessary to create a solid and fixed circulation at the Cape, by supplying the place of this paper money to such an extent as should be sufficient to give a fixed and permanent value to the remainder." Now it is impossible that the man who wrote this entertained the idea of the extinction of the paper money, and it would be an outrage upon common sense to tell Mr. Herries to his face that he did not look forward to some part of that paper remaining as a solid and fixed circulation at the Cape. It becomes an Attorney-General of a Colony to be cautious in speaking of the Home Government, but it certainly appears that the Government of 1825 did not very well know their own minds. The Proclamation of Lord Charles Somerset declares that his Britannic Majesty has determined to establish the British currency as the circulating medium of all the Colonial possessions of the Crown, and states that the Governor has in consequence issued the necessary instructions that a table or scale shall

be printed forthwith, specifying the relative value of the paper rix-dollar, and of all the lesser proportion thereof, with British money, in order to regulate the payment of the established Government fees, &c. This probably refers to the establishment of a measure for the circulating medium as a means of calculating the rates and taxes. But, admitting (what is not here expressed) that this Proclamation was intended to introduce the British currency, although it is known that nothing was ever done to introduce the precious metals, instead of the paper, yet admitting that this was the object of this Proclamation, the only inference is, that the person by whom it was drawn up did not understand the paper he undertook to explain; and we are just as well qualified, and a little more interested, to form a right conclusion respecting it than he was.

Mr. Advocate CLOETE.—That Proclamation was confirmed by the Home Government.

ATTORNEY-GENERAL.—It was; but what does the minute say? You are to withdraw all the rix-dollar notes; those under ten dollars you are not to re-issue but send them home; and those above that value we shall give you directions how you are to dispose of; and you may in the meantime issue any portion of these you may want for current expenditure. I think I am justified in saying that there is some little incongruity between the minute of the Treasury Board and their instructions to their own officers, and this within a month or two; ere the ink of the one was dry, the other was sent out. The only way I can reconcile them is by supposing that the intermediate period was intended as an opportunity for the redundancy to escape. I know of no reason why I should consider that opportunity to be now, rather than then. On the whole, my original argument remains unimpeached,—that the Treasury minute was intended merely to catch the redundancy; and that when there was no longer a run for Treasury bills, grounded on the depreciation, the remainder should be of permanent value. It appears to me, therefore, that we are not only called upon to express our sentiments on these documents, but that we are perfectly borne out by them in the sentiments we have expressed. The other objection of my hon. and learned friend went substantially upon the evil of this Colony being charged with 2 per cent. upon a portion of a balance

in the Treasury chest. This is certainly only a balance of disadvantages. If comparing plans, it is found that certain important public works which are urgently wanted, cannot be erected at a small charge to the Colony, it must be admitted that the proposed arrangement promises to be extremely useful ; and if, in sending a representation to that effect to the Home Government, we could attach to our request the mention of some specific work, in favour of which the voice of the whole Colony would be uplifted, then it appears to me the further objections of my hon. friend would be obviated, when he says that the request has already been made and refused, and what is the use of our going back without some additional circumstance to urge ? My hon. friend opposite (Mr. Cloete) thinks it will be a bad bargain for the Colony, and my hon. friend on the left (Mr. Ebdon) thinks it will not bear the Home Government harmless. But both of these positions cannot surely be right. My hon. friend (Mr. Ross) says by taking the bills of the Treasury we save them the expense of sending out specie. Now, without venturing into the subject of the exchanges, for I did the other day put my foot into that Serbonian bog, and was thoroughly engulfed before I knew what I was about, but thus much is clear, that as far as their expenditure goes, the Commissary here, who represent the Treasury, can always get $1\frac{1}{2}$ per. cent for these bills from any person who wants to remit. Any merchant can obtain $1\frac{1}{2}$ per. cent on his bill, and it is acknowledged that no bills are so good as those of the Treasury. Yet no one would consider that by taking a merchant's bill at that rate, he laid him under any obligation ; on the contrary the transaction is entirely for value received, and if one person will not agree to the terms they may be obtained from his next door neighbour. Seeing that Treasury bills can always command $1\frac{1}{2}$ per. cent., it is evident that we have no right to set off any obligation on that account. It appears, then, that these resolutions do just express the very thing that ought to be expressed ; and I do trust that when they go home with the recommendation of your Excellency and the concurrence of this Council, they will be agreed to by the Home Government, and thus be instrumental in obtaining for the Colony the erection of various public works, of essential and permanent importance.

I promised my friend some economic authority. Not having McCulloch at hand, I shall refer him to Adam Smith with supplemental dissertations by McCulloch, p. 489: "In the first part of this note we endeavoured to show, in the first place, that when the power to supply money is not restricted, its value depends, like most other commodities, entirely on the cost of its production; and that in the second place, or when the power to supply money is monopolised, its value does not depend on the cost of its production, but on the quantity in circulation compared with the demand. This distinction is of very great importance, and should never be lost sight of. Its elucidation has served to clear up almost all the doubts and difficulties with which the theory of money was previously encumbered, and has been a means of suggesting several important practical measures. Until very recently it was universally supposed that the ability to convert paper into gold at the will of the holder was necessary to sustain its value. But it is plain, as well from the principles already stated as from experience, that the mere limitation of the quantity of paper made legal tender is quite sufficient to preserve its value on a par with the value of gold, or to raise it higher. When the restriction on cash payments at the Bank of England took place in 1797, it was generally and confidently predicted that the value of her notes would immediately fall: but their employment in the payment of dividends and of the public taxes really made them, in some most important respects, a species of legal tender; and to the surprise both of the friends and opposers of the restriction, they continued for three years to bear a small premium over gold; and their depreciation, which began in 1800, was entirely owing to the greatly increased quantities that were then thrown upon the market." I pause here a moment to observe that a paper issued by Government, or by a board under the orders of Government, is, in the opinion of all economists, the only true circulation. The writer thus proceeds: "The obligation to pay in bullion compels attention to be paid to principles that might otherwise be contemned; but that is all. And hence it follows that if sufficient security could be obtained, that the power to issue inconvertible paper would not be abused, and that its amount would be enlarged and diminished so as to preserve its value on a par with

gold. The latter might be entirely dispensed with for all pecuniary purposes, except as a standard, though it might still be expedient to use a subsidiary silver and copper currency, as at present, for small payments."

MR. EBDEN.—The "standard" referred to there is gold?

ATTORNEY-GENERAL.—Clearly.

PUBLIC DINNER TO THE ATTORNEY-GENERAL AT GRAHAM'S TOWN.

On the 24th of October, 1840, a public dinner at Watson's Hotel was given by the inhabitants of Graham's Town to the Honourable the Attorney-General, on the occasion of this his first visit to the Frontier Districts. About seventy persons sat down, amongst whom were the Chief Justice, Sir John Wylde, the members of the Bar on circuit, the Resident Magistrate of Graham's Town, Col Somerset, Major Lelwyn, R.A., Major Burnie, 91st Regt., Major O'Reilly, Asst. Com. Gen. Sanford, and several other Military Officers,

Dr. Atherstone, sen., discharged with great credit the duties of Chairman, and Messrs. G. Jarvis and J. D. Norden those of croupiers. In proposing the toast of the evening, the Chairman, Dr. Atherstone, introduced it by claiming the indulgence of the meeting, for that after the eloquent observations which had just been made by Sir John Wylde, in reference to their distinguished guest, he felt most deeply his own inadequacy to do justice to the subject. He had powerfully forced upon his mind the truth of a remark which he had heard, that there are times when every man finds his nerves unstrung, and when all dependence upon himself was, as it were, broken down. That feeling he felt acutely at that moment. When called upon to take the chair he then filled, he felt proud, as he was sure he ought to feel, of the distinction, but then that pride had beclouded his judgment, and, for the moment at least, hid from him his own inefficiency to discharge the duties of the distinguished position in which their kindness had placed him. The task which

he then had to perform was no ordinary, though a most delightful one, namely, to express in suitable terms the high regard and sincere esteem which the inhabitants of Graham's Town entertain for him whom he was about to name. That task he felt to be difficult so as to ensure the approval of a large assembly like the one before him, composed of those, who, John Bull like, would expect him to do it in the best manner, and to state bluntly the naked truth, which was, that throughout that large and populous town, there was but one voice heard with regard to that distinguished individual ; one universal acclaim, the reverberations of which he trusted would reach the most distant corner of the Colony, until ere long it sounded upon the ears of those whom he loved at home. His honourable and learned friend would, he hoped, acquit him of all intention to offend by any laudatory observations which he might offer ; but they stood in his brief, and duty to his clients demanded from him the uncompromising fulfilment of his instructions. What should he say then ? That he would carry with him from Graham's Town the warm attachment of the inhabitants, and their highest respect for that independency which had invariably marked his public conduct in that Colony. He proposed the health of the Honourable W. Porter, Attorney-General.

Air :—St. Patrick's Day in the morning.

MR PORTER then rose, and in a speech of great beauty and power returned thanks. He commenced by expressing an anxious wish that the exhilarating sounds of his national music might excite corresponding emotions in his own mind. For he was so overpowered by the kind and flattering manner in which he had been greeted, that he was quite at a loss to express what he felt, and what he desired to convey to them. He remembered, however, an observation of one who, when he arose to address an audience, said that he stood up to think audibly ; he in the same manner did not present himself to make a speech, but simply to give utterance to his thoughts, to say what was then floating in his mind, and to thank them from the bottom of his heart for that warm and cordial reception with which they had favoured him. He should bespeak their indulgence for the desultoriness of his remarks, for to make an after-dinner speech was of all undertakings the most impracticable. To square

the circle, to invent perpetual motion, would be a matter of less difficulty, for so perfectly intangible was it that it reminded him of the ingenious American who said that "he had got the small end of nothing wittled down to a point." On one previous occasion he had been under the same circumstances in which he then found himself. On that occasion the members of the profession to which he belonged honoured him with a public entertainment, and he was called upon to address them at that time. He was on the eve of weighing his anchor, and adventuring on an unknown sea. He had many ties of kindred and country to bind him to his native shore, but there were those who told him that in Africa, at a distance of more than 5,000 miles, there were British hearts to respond in unison with his own, and British tongues to bid him welcome. But the half only had been told him, for had he been informed that he should have met with the reception of that evening he should have considered it the wildest dream of the warmest and most extravagant fancy. From his first landing in Table Bay, just thirteen months ago, to the present moment, he had met with nothing but invariable kindness. This had been the case especially in the members of the Bar, among whom, perhaps, the absence of that cordiality might have been expected. Most of them were his seniors in years, many superiors in experience and knowledge of civil law, and it would not therefore have been unreasonable had he, who had been put as it were over their heads, been met with some degree of coolness. Instead of this he had been received by them with that generous frankness the recollection of which would ever be to him a source of high gratification. The kind attention which had been shown him by the Bench was no less conspicuous. And to his other obligations he had to add the flattering terms in which their distinguished guest, Sir John Wylde, had that evening been pleased to speak of him. It would ill become him, nor was it necessary for him to state his high respect for that learned Judge. He remembered an anecdote of the great Dr. Johnson, which was apposite to the circumstances in which he then found himself. He (Dr. Johnson) was in the Royal Library, when his Majesty King George the Third entered the

room, and engaged him in conversation. That monarch complimented the Doctor very highly on his literary productions, and expressed a wish that he might be spared to continue them. And what reply, said the person to whom the relation was made, did you make to this? "Reply, Sir," said Dr. Johnson, "I said nothing; it was not for me to bandy compliments with my Sovereign." He (the Attorney-General) felt the more grateful for the consideration with which he had been treated, because he was so well aware of the great difficulties of the office he had the honour to hold, and of his own inadequacy to discharge fully its duties. He might be allowed to magnify his office. It was one of deep responsibility; but whatever might be his deficiencies he could with confidence say that he brought thereto that inflexible independence of mind which nothing could subdue, he brought to it a most unspeakable hatred of oppression of every kind and a most anxious desire to discharge its duties so as to advance substantially the public interests. It was related of Mahomet, whom, notwithstanding the expression of many fine sentiments, he must ever consider an impostor, that on a certain occasion he found two sparrows contending for a single grain of corn; this dispute he endeavoured to settle, and was upbraided by his wife for thus wasting his time in what appeared to be so frivolous an employment. "Woman," said the stern philosopher, "in that dispute were involved the immutable principles of justice, and nothing can be small or frivolous, or unworthy the attention of the universe, which goes to preserve them inviolable." He was no less sensible of his responsibility as a member of the Legislative Council, and it was that which had brought him amongst them. In making the circuit he could assure them he was not a Dr. Syntax in search of the picturesque. He was convinced that no member of the Legislature could efficiently discharge his duties unless he knew something of the country and its inhabitants. He was desirous to see and hear for himself, and though a want of acquaintance with the Dutch language had been a sad drawback, yet he trusted that in the course of his journey he had collected that information, which, in due time, would be turned to good account, and be made of benefit to the community. It was his anxious desire to

promote amongst all a spirit of unanimity, convinced as he was that one drop of the milk of human kindness was worth more than all the waters of bitterness that had ever flowed since the world was formed, and he would say, therefore, in a voice to be heard throughout the Colony : perish party, but live philanthropy ! He should avoid as far as possible touching upon politics, but still there were one or two points to which it seemed desirable that he should allude. He had seen in the course of his journey the serious losses to which the farmer was subject by those cattle thefts which were of such frequent occurrence ; he saw that he could not obtain redress with that facility which he considered ought to be afforded him ; that he had first to go to a Magistrate at a considerable distance, and afterwards to attend at the Circuit Court at the loss of considerable time, during which his family were left unprotected. He was not prepared to say what remedy should be applied to that evil, but he was deeply impressed with the necessity that it was an evil of such a character as demanded the adoption of a remedial measure. It had occurred to him that the most practicable means would be the extension of the jurisdiction of the power of the Magistrate, even though it were to militate in some degree against that great bulwark of our constitution, trial by jury. It might be necessary also to augment the number of Magistrates ; but without doing more than merely referring to these points, as ideas which had occurred to his mind, he could assure them that the whole subject should engage his most earnest attention, with the view of submitting to the Legislative Council such a measure as would meet the difficulty. There were also, he was aware, difficulties connected with the border system which demanded attention ; he was not prepared to state the nature of those difficulties, still less to point to the remedy, but if the complaints he had heard were all founded, and surely that could be ascertained, if grievances did really exist, he for his part knew of no earthly reason why they should not be redressed. There was one other point to which he would advert, namely, the inconvenience, expense, and trouble to which the inhabitants of the country districts were subject for want of local land registries. He saw no reason why this should not be obviated ; he thought that every district might have its registry which makes returns to

the general registry at Cape Town ; he thought that a measure of this kind might be adopted with great advantage to the public, and without in any way weakening that security which it was so desirable to continue unimpaired in reference to landed property. Having adverted to those few points, as being the most prominent to his mind, he should pass to matter of a more agreeable character. It was true, as Sir John Wylde had informed them, that he had been highly delighted on entering that district. He (Sir John Wylde) had bid him prepare for an agreeable surprise, but he found that the half had not been told him. He had been charmed with the beauty of that district, but more so with that intelligence which was displayed everywhere around him. He had almost forgotten he was in Africa. In that town he discovered, in the intelligence, activity, and enterprise of its inhabitants, the germ of all those principles which were calculated to raise that fine Colony to that position which it ought unquestionably to fill. When he beheld so many young men before him, he considered that he viewed in them the hope of the Colony. It was gratifying to reflect that many in that district had raised themselves, by the exertion of honest industry and enterprise, to considerable opulence. It was most pleasing to see the style of their buildings, and to hear the incessant din of active trade and commerce ; it was refreshing to discover that independence of mind that could think for itself that could form opinions, and that did not hesitate to express them. Sure he was that by the cultivation of concord and unanimity they might be not only a thriving but happy people. Their worthy Chairman (Dr. Atherstone) might then stand a chance of being without a patient, and as for his own profession, why he doubted whether even his friends before him would have for him a single brief. Coming amongst them, as he then had, a stranger, he felt inexpressibly flattered by the kind reception with which he had been greeted, and the honour which had been done him that evening, and which while memory lasted would never be effaced. He would say to them, in the language of Scripture, "Peace be within thy walls, and prosperity within thy border," but in reference to himself language was too poor to convey to them what

he felt ; he should therefore not make the unavailing attempt, but sit down, saying from the bottom of his heart, " Gentlemen, I thank you."

ON TAXATION.

[*Legislative Council, Wednesday, December 2nd, 1840.*]

The ATTORNEY-GENERAL said, after the full discussion which this subject had received from the Secretary to Government, from his hon. and learned friend opposite, and from his two hon. friends near him, it would, he felt, be perfectly unwarrantable were he to occupy the attention of the Committee for more than a very few minutes. It still, however, appeared to him that some important matters had been mentioned which had not been followed out to their legitimate consequences ; and that some matters, no less important, had not been mentioned at all ; and he should therefore request the attention of the Committee while he endeavoured to discuss, in as orderly and consecutive a manner as he could, the several matters to which he now referred. Before saying anything with respect to the main question now before them, namely, what ought they to do or to determine, placed as they now were, he would pause a moment to see clearly what their present position was, and how it was they came to occupy it. Historically then (he said historically, because it referred to the transactions of a by-gone period, and transactions which had taken place a considerable time before his arrival in the Colony), it appeared that in the year 1837 a Committee of the Legislative Council had furnished a report showing clearly and conclusively the inexpediency of certain taxes theretofore existing in the Colony, and strongly recommending the abolition of the obnoxious imposts. In this able and elaborate performance it was convincingly demonstrated that some of the taxes which it was purposed to repeal were almost unproductive, that those from which the greatest return might have been expected were so very inquisitorial in principle that they were never properly

enforced, but had become, on the contrary, the least inquisitorial in practice that could possibly be imagined ; so that we implicitly relied on the honesty and candour of individuals for the due protection of the public interest in circumstances where to rely upon honesty and candour was the merest humbug and delusion ; and that, upon the whole, it would be difficult to devise a system of taxation which should be fraught with more evils and fewer benefits than that of which the abolition was recommended. He (the (Attorney-General) believed that no man in the Council, or in the Colony, disputed either the facts or the reasonings contained in this report, or denied the justice of the sentence of condemnation which the Committee had pronounced upon the taxes now alluded to. But the report did not stop with the sentence of condemnation, nor could it. It was clear that the exigencies of the public service were not to be lost sight of. It is never enough to show that a tax is inexpedient, it must also be shown that its repeal is practicable. Applying themselves to the essential part of their duty, the Committee of 1837 appeared to have assumed as unquestionable, what, indeed, could not be questioned, that considering the wants of the Colony, and the means of supplying them, these assessed taxes, bad as they were, could not be abolished, except upon the condition that something better were provided. How then was the equivalent to be got ? Why, according to the Committee, by an improvement in the revenue of the Customs, to be derived from an alteration of a two-fold character, first the imposition of specific duties upon certain enumerated articles, and secondly, an increase in the *ad valorem* duties previously paid. Well then, such being the proposal made to the Home Government, what has been their answer ? In the first place, a distinct intimation that that proposal in its full extent, without exception or qualification, had been acceded to by the Treasury and the Board of Trade ; an intimation which had gone out far and wide through the Colony, and had diffused the greatest satisfaction amongst all classes ; and in the second place, a subsequent Order in Council, of date 10th August, 1840, which, instead of adopting that proposal generally, adopted but a part of it, and while it imposed (with some slight modifications) the specific

duties recommended, left the *ad valorem* duties absolutely untouched. In this predicament we now stood, and the question was, what ought we to do? His hon. friend upon the left (Mr. Ebdon) advocated what was certainly a very simple course, and what was, if practicable, the very best that could be pursued, namely, to take the Order in Council as it was and forthwith abolish the assessed taxes; trusting that, one way or other, there would be no deficiency in the revenue; or, if any should appear, that we should be able to devise some other way to make it good. Now he (the Attorney-General) did not deny that if the anticipations of his hon. friend could be relied upon, if the Customs' revenue could be safely calculated upon as likely to realize permanently from the present *ad valorem* duties, together with the new specific duties, a sufficient equivalent for the taxes sought to be abolished, then the Order in Council should be at once called into operation, and the assessed taxes be allowed to pass away amongst the things that were. But he (the Attorney-General) was compelled to believe that upon this, the cardinal point on which the question turned, the anticipation of his hon. friend could not be relied upon. This was a subject upon which it was probable that every gentleman in the room could form a more accurate opinion than he could. But from all he could learn from mercantile men, and he had endeavoured to obtain information as accurate as possible, he felt himself justified in stating that importation into this Colony had been recently stimulated by accidental circumstances; that the stream had overflowed the channels in which it naturally and usually ran, and that the striking diminution which the imports of 1840 exhibited, when compared with those of the three or four preceding years, was indicative of a still further decline which might hereafter be expected. Even, however, if the average of the last five years were taken as a guide, the annual increase in the revenue from the new tariff would very little exceed the amount of the taxes which all were desirous to repeal. But as that average was generally—were it not for the dissent of his hon. friend he would almost have said universally—supposed to be a delusive guide, he came now to enquire what amount could fairly and reasonably be looked for? The answer to this question depended

upon the extent and nature of our imports, and he believed that when in 1837 his hon. friend the collector of the Customs stated to the Committee of that day that the average of the years 1835 and 1836 might in his opinion be fairly taken as the probable annual importation of the Colony, he gave what was then, and what was still, considered to be as high an estimate as any prudent financier could act upon. Assuming this estimate to be accurate, and he was not aware that it was viewed by the public as erroneous, the annual increase which the new tariff would give would be, according to the returns now before the Committee, about £12,000, while the taxes to be repealed amounted to £15,000. How then were we to proceed? There was only one other way of making these sums balance each other, and that way had been adverted to by his hon. and learned friend (Mr. Cloete), but he agreed with his hon. and learned friend that it was a way which they could not have, and which they ought not to have, the slightest hopes of treading. To look for a reduction in the public expenditure was idle. The truth was, that that expenditure was too little. With emigration to be facilitated, with roads to be rendered passable, with a cry for additional magistrates resounding in every quarter of the Colony, with a number of other matters, which might be readily enumerated, demanding loudly the attention and the aid of Government, we were compelled to treat them all in a spirit of pinching and hunger-bitten economy, under the influence of which the Colony was half starved. A reduction of expenditure then was quite out of the question, and upon the whole, though he quite agreed with his hon. friend (Mr. Ebdon) in thinking that they should adopt the new tariff, if they could, though he quite agreed with him in thinking that if the additional experience which he had derived from the three years' delay which had taken place since the proposal of the Legislative Council was first submitted to the Home Government—a delay, in his opinion, not very creditable to the Home Government, and very injurious to the Colony—had proved that more was originally asked than was required, and that were the thing to be done again, the specific duties granted would alone have been demanded, and the *ad valorem* duties with-

held would never have been sought, he was yet compelled to come to the conclusion that as the new tariff, if substituted for the old taxes, would in all probability leave a clear deficiency of necessary revenue, it would be in the highest degree dangerous to make that substitution. He would not dogmatically assert that he himself was right and that his hon. friend was wrong. It might be that his hon. friend was not at all too sanguine, and he hoped sincerely that such might turn out to be the case. But revenue was a ticklish thing to meddle with, and wherever a reasonable doubt existed, it was right, he thought, to give the revenue the benefit of that doubt. If his hon. friend should prove to be correct in his estimate of the continued importation into the Colony, it would be very easy to let old taxes go ; but if his hon. friend should prove to be incorrect, it might not be easy to set new ones going. He now came to the real practical point which it was to-day their duty to determine, namely, should the new tariff be acted upon in its present shape, or should the Home Government be again implored to make the boon complete ? This was a matter of some nicety, and he (the Attorney-General), without giving any positive opinion one way or other, and quite willing to go along with the general feeling of the Committee upon the subject, whatever that might be, would yet indicate some of the reasons which might appear to the adoption of each respective course. In favour of the adoption of the new tariff it might be urged that the assessed taxes were upon our own showing very bad ones ; that therefore we should repeal the most obnoxious of them, though we might not be able to repeal them all ; that the celebrated aphorism which assures us that half a loaf is better than no bread, is strictly applicable to this case ; that by putting the Order in Council into immediate operation no additional expense would be incurred ; while by abolishing the equivalent amount of the assessed taxes, some expense and more annoyance would be saved, and that our taking this instalment, as now offered, would not preclude us from soliciting the Home Government, if necessary, to carry the plan as originally assented to by themselves completely out. Upon the other hand, against the adoption of this new tariff it might be said

that a partial repeal of the assessed taxes would be a matter of some difficulty ; that we may entertain reasonable hopes that the Home Government will reconsider the subject, and return to their original opinion if the reasons for it be brought before them in full force ; that this cannot be done if, by apparently diminishing the evil, we diminish at the same time the urgency of its total removal ; that it is dangerous to afford the Home Government an opportunity for saying " the thing is working in one way or other, and as we have so many other things to attend to, we may as well let it work on as best it can ;" that the interval which need elapse between the present time and that of receiving the *ultimatum* of the other side, is not so long to be of much consequence, and that the better course will therefore be, to tell the Home Government that the good given is useless without the good withheld ; and pray them to accomplish the work so auspiciously commenced. Having made these observations he should now sit down, were it not for a remark of his hon. friend (Mr. Ebdon), which he had forgotten to notice in the right place, and on which he wished to say a word. His hon. friend had said that an increase of the *ad valorem* duties is opposed to sound principles. Now it so happened that his hon. friend and himself both read Adam Smith now and then, and that they seldom if ever differed as to the principles, though they sometimes disagreed as to the application of those principles. But to what sound principle was a reasonable augmentation of *ad valorem* duties found to be opposed ? He conceived the rule to be this, that prohibitive or protective duties were invariably impolitic ; but that duties imposed *bona fide* for the purposes of revenue were not necessarily objectionable. Who paid the increased duties ? The same community which must have paid the same amount in some other, and for the most part in some more objectionable shape, if these increased duties had never had existence. If, indeed, a trifling addition of 2 per cent. were to turn manufactures of Great Britain out of the colonial markets, if new Birminghams and Manchesters were to spring up under such encouragements, and the artizans of England cease to supply our wants, then indeed the duties would be impolitic, and the mother country might complain. But when all such

expectations are wilder than a dream, and the only extent of the advance demanded will be to raise a revenue for want of which the Colony is languishing, in a manner which no man thinks of, and for the payment of which he does not at the end of the year feel himself one whit the poorer, then he (the Attorney-General) while he admitted that duties, simply as duties, were objectionable, could not at the same time but be strongly of opinion that there were cases in which they might be successfully defended, and that the present was a case of precisely that description.

ON THE SAME SUBJECT.

[*Legislative Council, Thursday, December 17th, 1840.*]

The ATTORNEY-GENERAL said he thought there was not, or at least that there ought not, to be any substantial difference of opinion in the Council upon the present question. With the exception perhaps of his hon. friend on the left (Mr. Ebdon), and his hon. friend opposite (Mr. Breda), who he considered would very likely, had he been present, have agreed with the majority, every other member then in the room was bound, upon every principle of consistency, to affirm by his vote the expediency of preserving for the purposes of general revenue the tithes on grain. (No, no, from Mr. Ross.) His hon. friend said no, but he (the Attorney-General) still considered that the fact was as he had stated it, and he felt that he should easily be able to convince his hon. friend that he was accurate. Before, however, he did this, he wished to say a word on the point of order which had been raised between the hon. Chairman and some other members who had spoken. It appeared to him, he confessed, that it was competent for Mr Ebdon to propose such a resolution as he had submitted to the Council. What were the facts? Certain resolutions connected with the recent Order in Council, and the new duties therein contained, had been passed

at their last meeting, and transmitted to the Governor. His Excellency, in the exercise of what he (the Attorney-General) believed to be a sound discretion, had come to the determination of pursuing a course different from that of which the Council had recommended the adoption. The Council were now called together in order that His Excellency's intention to deviate from the time of action proposed by them should be formally communicated. Under these circumstances he (the Attorney-General) considered that the whole subject, as it had been originally laid before them, was now a second time under discussion ; that the new aspect which it had assumed might reasonably demand a new expression of opinion ; and that if there was anything which the Council wished to say in order to keep themselves right with the public, or to make the expression of their sentiments full and complete, they had an indisputable right to say it. Turning now to the more immediate question, and to his hon. friend (Mr. Ross), whom he had promised to answer, and who still looked remarkably inquisitive, he repeated that, in his opinion, every member who had concurred with the majority at the former meeting was called upon, by a regard to consistency, to oppose the repeal of the tithes on grain. The majority at the former meeting had affirmed the proposition that a simple substitution of the new tariff for the old assessed taxes would leave a deficient revenue. So strong was this impression that they actually voted against putting the tariff in operation at all. He (the Attorney-General) had certainly been surprised into that vote, for in stating the reasons for and against the immediate adoption of the new duties, he felt in his own mind that the most persuasive were in favour of the new measure, and he consequently conceived that such would be the feeling of the Council generally. However, he certainly had concurred in the vote ; and in now expressing his dissent from it, he was liable perhaps to the charge of vacillation. But let that be as it might, the Governor, by virtue of the power entrusted to him, had ordered the instant promulgation of the tariff, and could those who were then inclined to cushion it on the very ground of its insufficiency to supply the place of all the assessed taxes, could they, he asked, consistently with their former vote, now recommend that all those

assessed taxes should forthwith be repealed ? If at the last meeting they had done what he thought they should have done, namely, taken what they had got, and kept crying for the rest, would anyone have maintained that, pending the application to the Home Government, the whole of the assessed taxes should at once be swept away ? They then had voted that there would be a deficiency, and were they now to vote so that that deficiency should be rendered greater than it otherwise need be ? He thought not ; and he therefore thought it would contradict the principle of their former resolutions to affirm that which was now proposed for their adoption. He fully admitted that his hon. friend who proposed that resolution (Mr. Ebdon) was perfectly consistent, but he could not say the same of any other member who gave it his support. In the remarks which he had made he had taken it for granted that the only point which they had to determine was, whether or not any one of the assessed taxes should be preserved. If the Council should be of opinion that the repeal could not be total, that some one must be continued, and that the only thing they had to do was to choose the one best worth preserving, he believed that the tithe on grain would at once commend itself as in every way the most expedient. It was collected by the market master, and collected without trouble or expense. The capitation tax which had been spoken of by his hon. and learned friend (Mr. Cloete) was perhaps, of all the assessed taxes, that which cost the most in proportion to which it produced. It was urged, however, that the tithes on grain were oppressive upon the agriculturist, and that we should consider the circumstances of the tax-payer as well as the convenience of the tax-collector. To this proposition he (the Attorney-General) cordially assented. He would be sorry to be, or to appear, indifferent to the interests of agriculture, or to any hardships of which those engaged in it could reasonably complain. But had the hardships in this case been proved ? It was said that the farmer would be treated with injustice, because while, in common with other classes, he paid his share of the increased duties, he would now be called upon, over and above this, to continue the payment of the tithes on grain. This argument was, however,

completely suicidal. The moment you prove that the farmer pays the Custom duties, you prove that he does not pay the tithes on grain. If the farmer pays the Custom duties, then it follows that it is the consumer and not the merchant who pays that tax, and if it be the consumer and not the merchant who pays that tax, then it is the consumer and not the farmer who pays the other one which they were now considering ; the principle in the one case is identical with the principle in the other, and the advocate of the agriculturist cannot be allowed to blow both hot and cold. Trusting that the allegation of hardship to the farming interest had now been sufficiently answered, he would next observe, that he had great doubts whether the humble remonstrance which the Colonial Government would probably make to the Government at home, would not be rather strengthened than weakened by continuing a part of the assessed taxes. If they abolished or suspended the whole of those taxes, then it might be said, "there is no practical grievance now in existence ; there is therefore no hurry in the case ; we shall await the result of the tariff, as now in operation, and see how the revenue stands the test, before we do anything upon the subject." If, on the other hand, we can say : "For what you have given us we are very grateful, but unfortunately, you have not given us enough ; to avert the evils of a deficient revenue we have been obliged to continue one of the taxes of which the inexpediency has been already demonstrated to your satisfaction ; we beg you to make that continuance a temporary evil by making such alteration in the tariff as can enable us to do away with it ;" in this point of view it was not, perhaps, unreasonable to suppose that the hands of the Colonial Government might be strengthened, by resorting to a course of proceeding which was at the same time imperatively demanded by the financial necessities of the Colony. For these reasons—because a certain revenue must be raised, because the new tariff could not raise it, because they must select some one of the obnoxious taxes, and because the tithe on grain was the fittest which they could select—it appeared to him that there could be no difficulty upon the part of the Council in coming to a right determination on the question then before them.

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1841.

ON THE

LAW OF DEBTOR AND CREDITOR.

[*Legislative Council, March 22, 1841.*]

The ATTORNEY-GENERAL said :—

In rising to introduce the motion of which I have given notice, I feel myself under the necessity—a necessity much more imperative than any which I have ever experienced upon any similar occasion—of bespeaking the kind indulgence of your Excellency and the Council. I shall be obliged to refer to topics of a very dry and uninteresting, not to say of an absolutely technical and repulsive character. My way will lie through a bare and sterile region, nor shall I be able to cull, I fear, one single flower. In this utter destitution of everything that might give life or animation to what I might have to say, I should, perhaps, have despaired of the attention of those whom I address, were it not that the great and acknowledged importance of the subjects which I shall have to handle—subjects which, in one shape or other, affect the interest of almost every man in the entire colony—must forcibly arrest the minds of all who give to such considerations their due weight, and obtain from this Council that careful and deliberate investigation of the points in question which matters of such moment are entitled to receive. I should, without further preface, enter, at once, upon the task which I have assigned myself, but that a few words of explanation respecting the manner in which I have deemed it best to bring the subject forward, appear to be demanded. What I am doing is, as your Excellency is

aware, wholly unconnected with the Executive Government. The subject of this motion is one with which the Executive Government, as such, has, in my mind, no legitimate concern. I, therefore, have not sought to secure the support of the official, any more than of the unofficial, members of Council, and have thought it better to leave the matter simply to its own merits, believing that the ends in view will be more efficiently served by coming to the consideration of the question wholly and entirely unbiassed,—free from even that degree of prejudice which might arise from the slightest previous concert or agreement. Another matter needs a moment's notice. I move, as your Excellency will observe, for a Committee of Inquiry. It would, no doubt, have been competent for me to have pursued another course. I might have submitted to the Council one or more Bills embodying such alterations in the law as appeared to me to be required. But when I reflected upon the delicacy and difficulty which surround all such matters as we have now in hand,—the impolicy, not to say, impossibility, of legislating without the general concurrence of the well-informed part of the community ; the cautious and conservative spirit in which all laws and customs of long standing ought invariably to be approached ; the advantage of feeling the public pulse before we committed ourselves to any particular amendments, and the expediency of collecting as much information as might be within our reach, before sitting down to legislate at all,—I came to the conclusion that to move for a Committee was the safest line of conduct I could follow. Another consideration had its weight with me. I was sensible of the parental partiality which we naturally feel for our own offspring ; and I wished to keep myself clear, in this instance, from the operation of that principle. Having no earthly interest in the matter except to provide the public with the best system in my power, I could not, in any case, be wedded to any favourite notions. I may therefore hope that, under all circumstances, I should have been ready to abandon any idea which might have been proved to be erroneous. But still, in order to exclude effectually all undue bias,—to

prevent the possibility of even unconscious prepossession, I was led to give a preference to a course of proceeding which would allow me, undisturbed, to do that which I have alone the slightest wish to do, namely, to discuss the subjects for consideration with perfect freedom, and to come to that conclusion to which the strongest reasons point. I now proceed to discharge my more immediate duty. It is to explain the objects which I have particularly in view in submitting the present motion. It is not desirable that a Committee should be appointed without the purposes which it is intended to accomplish being, at least in some degree, understood. In what I am going to say I must mention many matters very familiar to every lawyer. I shall feel it necessary to refer to topics of which the introduction would be absurd were the Council made up of members like my honourable and learned friend opposite (Mr. Adv. Cloete). But I am not seeking to enlighten my honourable and learned friend, from whom (sitting, as I do, at the feet of Gamaliel) I am always ready to receive instruction in Dutch Law. I wish to speak to the Council generally, and through them to the public generally, and by that means to bring, if possible, the clear common sense of the intelligent classes to bear upon some questions of great importance; but questions, at the same time, more talked about than understood. If I can make myself intelligible, as I hope to do while favoured with the kind attention of the Council, I shall have attained the principal end in view; for perspicuity is, perhaps, the only, and is certainly the chiefest, ornament of which such subjects are susceptible; and if, from my limited acquaintance with the civil law, I should chance to err in any of my statements, both the Council and myself may have perfect confidence that the accurate and extensive knowledge of my honourable and learned friend (Mr. Cloete) will correct my sins of ignorance. The motion refers to the system of tacit hypothecations; to the system of general bonds; and to the system of Insolvent Law. I shall make some general remarks upon each of these topics in their order. First, then, we shall take the case of tacit hypothecations. The name hypothecation is not a common one to English ears;

but the corresponding term mortgage is sufficiently familiar. The Roman-Dutch Law recognizes three sorts of mortgages—the conventional, the judicial, and the tacit. The conventional mortgage, as its name denotes, is a right in or over property, created by the act or agreement of the parties. The judicial mortgage (as may, in like manner, be inferred from its title), is a right in or over property, created by the execution of legal process. It is not proposed to embrace in the intended inquiry, the conventional mortgage (except so far as a single species of it, the general bond, is concerned), nor to embrace the judicial mortgage at all. The conventional mortgage, generally, is a system of security practised in all societies, and known to every system of jurisprudence. In this colony, moreover, it has advantages in the way of publicity which I shall hereafter have occasion to allude to, and commend. The judicial hypothec, or Pretorian mortgage, is equally unobjectionable. Indeed I am not so bigoted in favour of that code of law with which I happen to be best acquainted, as not to prefer the judicial hypothec of the Dutch Law to the judicial hypothec of the English Law. By the Dutch Law the hypothec or lien does not attach upon any kind of property, movable or immovable, until the property, whatever it is, has been actually taken in execution. By the English Law a distinction is drawn, in this respect, between real property and personal (terms which, owing chiefly to some differences in tenure, are not precisely equivalent to the immovable and the movable property of the Dutch Law, but which are very nearly so), and while personal or movable property is not affected by a judgment until the writ of execution has been put into the sheriff's hands, the real or immovable property of a debtor, on the other hand, is bound by the judgment from the date on which that judgment is entered up, so that purchasers, even for valuable consideration, and without any express notice of this lien or incumbrance, take the property subject to the obligation of satisfying it in full, or, at least, as far as the value of the purchased lands extends. It is true that facilities are afforded by the English Law for allowing an intended purchaser to search for judgments, so as to protect himself, but since a judgment not

duly registered will still bind a purchaser who has notice of its existence, and since that notice may be constructive or implied, I confess that I regard the rule of the Dutch Law as much more simple, safe, and satisfactory. With the judicial hypothec established by that law, therefore, there can be no need to interfere. I now come to the third class of mortgages, on which, generally speaking, I am unable to bestow the same measure of commendation. The nature of the tacit mortgage, like that of the other two kinds or classes, may be inferred from its denomination. It is not constituted by any act or agreement of parties. It is not constituted by any kind of legal process. It is constituted merely by an actual or supposed peculiarity in the circumstances of certain debtors and certain creditors, by means of which the latter become, without more ado, invested with all the rights and privileges of conventional mortgages or execution creditors. It is a silent security, arising simply from operation of law. The creditors who are thus favoured at the expense of creditors in general form a long list. Without mentioning any of that class of cases commonly called "Liens," it may be observed of the tacit mortgage that the Treasury has it over the property of those who collect its taxes ; churches and other public institutions have it over the property of persons entrusted with the management of their revenues ; the party whose money has been given for the repair of property, has it over the property repaired ; the party who has only a limited interest in an estate, has it over that estate for any amount which may have been expended in its preservation ; the joint owner of undivided property has it for a due proportion of the money laid out by him upon that property for the protection of his own interest, but to the benefit of his co-tenant ; the landlord has it over property found in the demised premises, for the security of his rent ; and there are other instances of a like nature. It would not be difficult, I think, to go through these cases, and to show that they tend in general to do more harm than good. But in practice most of them occur but rarely ; and they may all be left at present without any particular discussion. This is not the case with the species which I have now to mention.

Minors and pupils, as also insane, prodigal, and interdicted persons, have this tacit hypothec over all the property movable and immovable of their tutors, curators, and guardians, as a security for the correctness of their accounts, and the regularity of their payments. It will be obvious that, as applied to this class of cases, the rule just stated must be in continual operation ; and I beg the particular attention of your Excellency and the Council, whilst I point out the manner in which it necessarily works. I confine myself to the instance of a minor and his tutor. The hypothec commences from the date of the appointment of the tutor, and only terminates when he has paid his balance. This may embrace a vast extent of time. If the hypothec began with the first act of mal-administration, and ended with the guardianship, or even with the rendering of the tutor's accounts, the apparent hardship might be less. But if a tutor who has duly discharged his trust for, it may be, twenty years, shall, at the expiration of that period, get for the first time into arrear, the tacit mortgage is, at once, thrown back over the whole intervening period,—and his property is in the same state as if he had made an actual mortgage of it, on the day of his appointment. And what is the effect of this ? Happily not quite so mischievous by the Roman-Dutch Law as it was by the old Roman Law, from which the principle is taken. But still, every dealing of the tutor with (not merely the minor's,, but any of his own immovable property, entered into during any part of the time embraced between his appointment and the payment of his balance, is at once avoided in favour of the minor creditor. If it have been sold for valuable consideration, the purchaser must either pay a debt of which he knew nothing, or give up his purchase. If it have been made the subject of a conventional mortgage, a similar consequence ensues. The prior tacit hypothec over-rides all subsequent transactions ; and that tacit hypothec, as I have already explained, may have its priority established by matter *ex post facto*. I have said that the rule of the Roman-Dutch is not so mischievous as that of the old Roman Law. By the latter movables were bound equally with immovables. At Rome, the minor could follow any ordinary chattel capable of being

identified and traced ; nor was he to be stopped by any number of *bonâ fide* purchases. A system such as this could never originate or be suffered to exist in any country where the interests of commerce called for the application of the principle,—one, for the most part both equitable and expedient,—that in movables possession should be taken as a sufficient proof of property. Accordingly, the text of the Civil Law soon received a memorable limitation from the Jurists of the Dutch School, and the maxim "*mobilis non habet sequelam*," having laid down as a rule of general application that movables could not be followed into the hands of third parties, the law freed personal property from the fetter of the tacit hypothec so far as it might have bound it in the hands of strangers, and confined its operation to the case in which such property still remained in the possession of the debtor. Upon the whole, then, the effect of the tacit hypothec by the Roman Dutch Law is to bind immovable property under all circumstances, and to bind movable property which, not having been *bonâ fide* parted with, is still vested in the debtor himself. Now the question is whether, having gone one step beyond the Roman Law, the Dutch Law should not go another? Having gone so far, are there cogent reasons for declaring that we should go no farther? This is the problem to be solved, and in order to assist, in some degree, in the solution of it, I shall now advert briefly to some general considerations relative to the nature of hypothecation, which seem to me to indicate the line of legislation which public policy might call upon us to adopt.

Mortgage is such an obvious mode of obtaining either money or anything else which men require, that it must have been had recourse to early. In fact, it is as natural as barter. The convenience of society having established the general principle, it must soon be found that that general principle would, gradually, assume two distinct forms. The distinction between these forms is very important. In one case there is actual possession given by the debtor to the creditor. This is the pawn or pledge of England ;—the *pignus* of the Roman Law. In the other case the

debtor still retains the thing intended for security, and all which the creditor has is a certain right to or over that thing. This is the mortgage of England, the hypotheca of the Roman Law. Now I should be disposed to say that, of those two cases, the pledge was to be favoured, and the mortgage not. In every variety of the first (which is obviously the primitive form of all hypothecation), the creditor holds the property on which he has made his advances; the former ownership is visibly divested, and no injurious consequences can reasonably be apprehended. To a certain kind of it (for such substantially it is) — I mean the lien of English jurisprudence (the “retention” of the laws of Scotland and of Holland) a species of security in very common use, the leaning of the Courts in the Mother Country has not been adverse, but the contrary. If the shipmaster retain the goods which he has carried; the bleacher the linen which he has bleached; the tailor the coat which he has made; the factor the merchandize on which he has made advances; till, in each of these cases, all just charges have been paid, we see nothing but an equitable principle at work which, doing justice to individuals, does no injustice to the public. But with hypothecation, as that term has been explained, we must be more cautious. There is here no visible change of interest or ownership. The debtor’s apparent means are not diminished. False colours are hung out. Still, however, those things must be, and, that being the case, the duty of the legislator would seem to be confined to the enforcement of these two rules,—first make public all your hypothecations,—and secondly, have as few of them as men’s necessities will permit. In reference to the first rule, I have to observe that the judicial hypothec is, from its very nature, public and notorious. And even with respect to conventional mortgages, as far as the question of publicity is concerned, I cheerfully bestow upon the principle of the Dutch Law my promised commendation. By that law, a formal act to be registered by some public Board or Office has long been essential to the validity of every mortgage; or, at least, every mortgage of immovable property. I presume that in Holland, previously to the introduction of the Code

Napoleon in 1812, a conventional mortgage confined in terms to movable property, might have been created by a deed not registered in the manner now alluded to. But it is considered that the instructions of Commissioner General De Mist have rendered registration indispensable to every instrument by which a preference either of movable or immovable property can, in this colony, be legally made good. It is clear, upon the whole, that from the local courts of Holland to the Deeds Registry Office at the Cape,—from the ancient Schepenen down to the modern Mr. Carey, our Registrar of Deeds,—the Dutch Law has carefully provided for the due publication of conventional mortgages. In this important particular the Dutch practice may claim a just superiority over the English. With the exception of an inefficient registry in Middlesex, in Yorkshire, and in Kingston-upon-Hull, England, strange to say, has not, and, whilst her country gentlemen retain the repugnance which they have constantly manifested, England, in all probability, never will have, any public place of record, by the aid of which titles and encumbrances can be satisfactorily investigated, and the true state and condition of landed property laid fairly open to those whom it may concern. In Scotland they manage these matters much better; and Ireland has possessed a very sound system of Registry ever since the reign of Queen Anne. Still, as regards the publication of conventional mortgages, I conceive that the principle of the Registry of this colony is second to none which may be found elsewhere; and that by it the safety and security of the public is most efficiently consulted. But every word of praise which I pronounce upon the conventional mortgage is necessarily an implied censure of the tacit. This cannot be registered in any way whatever. It descends without warning and without notice, and often with destructive force, upon the heads of those who have no idea whatever of what is coming. I might mention many cases: I will only mention one. It lately came to my knowledge, in connexion with a meritorious institution of which I am President,—the Savings Bank. This body was applied to to lend a certain sum, —I think £1,000,—on first mortgage of a house in Cape Town. The house was inspected, and found to be an ample security; and

the title being clear and unobjectionable, the money was lent and a mortgage bond taken. A short time since, the mortgagor became an insolvent, and the next intelligence which the managers received was a somewhat startling intimation from the Master of the Supreme Court, in his capacity as superior guardian of the interests of minors, that all the property of the insolvent was burthened with a tacit hypothec, prior in date to the conventional mortgage of the Savings Bank, and available for a very considerable sum. This was pleasant. And for whom was this tacit hypothec asserted? Why, for the mortgagor's own children. A kind aunt of theirs had left them money, and left it in the father's keeping, and by virtue of the principle which we are considering, they were to be paid to the uttermost farthing before the Savings Bank could touch a stiver of their thousand pounds. Happily after all, the bank lost nothing. As good luck would have it, it ultimately turned out that the insolvent had other property not specifically incumbered, on which, of course, the tacit hypothec was thrown, and thus the bank was accidentally enabled still to point to the creditable fact that, during ten years of extensive operation, it has not sustained a single loss. But this was, as I have said, an accident, and can have no effect whatever upon the essential merits of the case. Coming then to the application of the second rule: a canon of common sense as it appears to me,—I mean the rule which would confine the number of mortgages generally within the narrowest limits which convenience will allow,—I observed that, in my opinion, the tacit hypothecs are the proper ones to prune. They are so, because they are, as in the case which I have mentioned, secret, it may be unsuspected. They are pit-falls which no vigilance can discover. The conventional mortgage is recorded, but not so its silent sister. In investigating, as well as I was able, the legal system of other countries in connection with this subject, I have found that the tide of modern legislation has everywhere set in strongly against those tacit hypothecs. Holland, as you will have gathered from what I have already said, herself saw fit to restrict both the number and the nature of those which were recognized

by the Roman Law. By the Dutch Law the wife was gradually ousted of the peculiar security for her dotal property which the civil law allowed; and, above all, the withdrawal of movable property from the hypothecary grasp, so as to permit its alienation, was a magnificent move forward. The question then is, as I have already stated it, shall we now stand still or shall we make another step?

I need not pause to point out to your Excellency the origin of the right in question. Its origin was natural and even noble. It was a generous determination that orphans, who might have no other arm to protect them, should be protected by the mighty arm of the law. I give all honour to the feeling from which the principle first sprung, and to which it is still indebted for support. But I own I am afraid to trust myself upon these rapid, railway roads, to what compassion christens justice. I cannot but think that a view of public policy more enlarged and comprehensive, a calm and impartial estimate of the claims, not of one class of creditors merely, but of creditors in general,—would have led to a widely different conclusion. There is a saying of old Judge Twysden,—a contemporary, I think, of Coke in England, which though homely has some pith in it. “Charity is a good thing,” says he, “but for all that, we must not steal leather to make poor men shoes.” No such privilege as I am now speaking of is conferred by the laws of England, or of Scotland (based although the latter be upon the civil law), nor of Ireland, nor of any of the United States of America, except Louisiana, which inherits it from Spain and France. And why is not the principle carried out still farther? The widow is classed not unfrequently with the orphan. Shall we then deny the widow a tacit hypothec upon the property of her trustee? Old men, also—those who cannot dig and are to beg ashamed—shall they come in merely with common creditors, and have no preference? Such, however, is the decision of the law. And why, it may be also asked, should the minor, who is allowed to assert this privilege against the tutor, the pro-tutor, and, generally, in fact, against all persons interfering with his inheritance, be precluded from asserting it against the

executor of his ancestor's will, in whose hands his property may have been kept, and by whom it may have been dissipated? But such, again, is the decision of the law. Suppose a minor's money be lodged in the Cape of Good Hope Bank,—and let the Bank stop payment (an event which is little likely to occur so long as that concern has the benefit of such able and indefatigable management as it now enjoys), will the minor have, in this case also, his tacit hypothec? Certainly not,—not even a preference,—nothing but his simple rights as a mere concurrent creditor. It may here be proper to observe that this question of tacit hypothec is never a question between the pupil and the tutor. If it were, I should not waste my breath in saying a single word upon the subject. As against the pupil, it is clear as light that the tutor who makes default can have no rights whatever. But I pray your Excellency and the Council to keep in mind that the question is never a question between the pupil and the tutor, but always a question between the pupil and the tutor's creditors. It is only in deficient estates that the matter becomes of the slightest practical importance; for, if there be enough to pay all, no one, of course, can have the slightest reason to complain. What we have to decide is, whether it is right and just that a man who buys a house and pays full value for it, should, after the lapse of, it may be, 20 or 30 years, be called upon to pay his money over again, to make good a deficiency in certain accounts which his vendor, as tutor, long after the sale to him, allowed to fall into arrear. What we have to decide is, whether it is right and just that a mortgagee who, after doing everything in his power to satisfy himself of the security on which he is to lend his money, takes his regular registered mortgage, is to find afterwards that his registered mortgage is so much waste paper, since another mortgage, neither registered nor known, asserts a title paramount. Such a system, one would think, must make parents and others careless about whom they appoint, and tutors themselves careless about how they act. Both will rely upon this state of the law, as tending to cure all errors, and keep the minors safe. I state these difficulties because I feel them. There may, I know,

be difficulties on the other side. These I shall be perfectly willing to consider in committee. But I should deal uncandidly with the Council if I did not express my present opinion,—one which I hold subject to argument, and which I shall be perfectly ready to abandon,—and that opinion is, that these tacit hypothecs are not based upon sound principles ; that their policy is a short-sighted policy ; that their operation inflicts more suffering than it averts, and that the interests of the colony will be consulted by going with that stream which, as I have already said, seems so have set in against them. I am aware of the answer which may be given to the arguments on which I have now touched. It will be said that the principle of the hypothec is good, and that nothing is wanted but due publicity. Let the public but know, it may be argued, who are tutors and who are not, and all practicable inconvenience will be done away. There is high authority for this notion. It is embodied in a system of law too celebrated to be within the reach of my humble panegyric : the code Napoleon. By that code the tacit hypothecs are reduced to three, but one of these is the hypothec to minors. To enable this principle to work so as not to interfere with the public interests, the code civil obliges guardians to make public the hypothecs with which their property is burdened, and for this purpose they must, of their own accord, require inscription to be made (that is, have a mortgage registered) over their own immovable property (movables by the law of France are incapable of mortgage) ; and if, having failed to make such inscription, they have dealt with any of this immovable property without expressly declaring that that property was subject to the tacit hypothec, they are pronounced to be guilty of the crime of *stellionate* or fraud,—an indictable offence. This principle is well worthy of consideration, and it will, no doubt, receive the attentive examination of the Committee. At present I shall only venture to express my fears that such a law is not likely to be very vigorously enforced ; that it would, in practice, be found to want that degree of public sympathy without which all penal legislation becomes inoperative ; that such a registration could, with diffi-

culty, be effected by all those persons whose interference with the minor's property creates, by law, the tacit hypothec, and that such registration, even if universally effected, might scarcely meet the fair necessities of credit, since, being the record, not so much of an actual, as of a contingent, liability, it might unnecessarily cramp the transactions of the cautious, and, on the other hand, keep but insufficiently in check the confidence of the sanguine. All these things, however, will be for the Committee; and, conscious of the length at which I have already trespassed upon the Council, I now quit the subject of the tacit hypothec, and proceed to the second branch of the resolution which I move. Your Excellency will be aware that I am now to say a word or two respecting the general mortgages or bonds, so common in this colony. I question if there be a single topic upon which public opinion is more divided than it is upon this topic of general mortgages. You won't meet any two men who will tell you, successively, the same story. One intelligent gentleman tells you that if something be not done to abate this nuisance, he must wind up his affairs, and quit the colony. Another intelligent gentleman tells you, in five minutes after, that if you venture to touch this species of security, he is determined to bid you, at once, an affectionate adieu. How shall we decide between these conflicting parties? The task is not an easy one; but in order to assist us in the due performance of it, I propose to consider briefly what that general mortgage is which all the hubbub is about. It is, as I stated early in my observations, a species of the conventional mortgage, and, in order to secure any preference, it must, according to the law of this colony, be duly registered. By this general mortgage, the mortgager binds all his present and all his future property, movable and immovable, in security for the debt. It is termed a general mortgage to distinguish it from the special mortgage,—that is, a mortgage by which certain particular immovable property is hypothecated. In practice, every special mortgage is also made a general one, but the converse does not hold, for general mortgages are numerous in which there is no

special hypothecation. A general mortgage does not bind even immovable property in the hands of a *bonâ fide* purchaser or mortgager for valuable consideration ; an important fact, and one which distinguishes its operation from that of the tacit hypothec of which I have already spoken. With respect to movable property, it is to be observed that the maxim formerly quoted "*mobilia non habent sequelam*," applies in this case also, and that the general mortgager cannot follow goods and chattels which have passed into the possession of third parties,—his right being restricted to a preference over the movables of the debtor not disposed of, and remaining in his own possession. It will thus be evident to the Council that the general mortgage,—I do not speak now of the mortgage which is both general and special,—but that the general mortgage, considered in itself, has few of the ordinary characteristics of the hypothec, and amounts, in fact, simply to a preference. In this respect it contrasts, and contrasts favourably, with the tacit hypothec of the Dutch Law, which I have already dwelt upon at so much length, and still more strongly with the Roman Law, as well as with the system of modern Spain and ancient France, according to which a prior general, was always preferent to a subsequent special, mortgage. The judicial hypothec is also paramount to the general mortgage,—that is, the claim of the execution creditor prevails against that of the prior general mortgagee. What, then, is the crying grievance connected with these general bonds of which we hear so much ? It seems to be this, that scarcely an insolvency takes place in this colony in which one or more of these general bonds does not assert its preference, so as to leave nothing whatever for the great body of the creditors. These securities, it is said, are made the instruments of favouring particular creditors, and of defrauding all the rest. But, after all, there is an important previous question to be settled, and that is, whether it is possible to devise any system of law by which particular creditors can not be favoured ? Are we prepared to say that there shall be no legal mode of making any one debt preferent over any other debt, except by taking real security in the shape of a special mortgage of

immovable property, particularly set forth and described ? And if we be not prepared to go this length, how can we reasonably prevent A. B. from telling C. D. that he will not give him credit unless he has such or such a security for his debt ? a precaution which creditors not so long-sighted may be willing to do without. And how can any one complain of the law which permits A. B. to get the advantage in question, when the deeds registry will show to anybody who takes the trouble to consult it, how the matter stands ? The practice in England is often adverted to by the parties who complain of the colonial system. Let us look, for a moment, at what that practice is. In England there is, certainly, no security similar in form to that which I am now discussing. It may be stated as a rule, sufficiently accurate for our present purpose, that, owing to the various statutes against fraudulent conveyances, and those provisions of the bankrupt code connected with reputed ownership,—movables, in England, cannot be dealt with so as to secure a creditor, except by delivery to that creditor. It is true, moreover, that in bankruptcy, the general rule is, no preference, all debts there being looked upon as equal. Still, however, it is indisputable that the principle of equality of debts is, according to the law of England, not the rule but the exception. When an English debtor dies—as debtors in England will sometimes die—leaving behind him a deficiency of assets to meet his engagements, what takes place ? Do no particular kinds of debt take precedence of debts in general ? Quite the reverse. The executor must begin at the top and walk down a descending series of debts, step by step, as he would down a flight of stairs. He must, at his peril, pay every one in his proper order,—first, funeral and probate expenses ; then crown bonds ; then debts preferent by statute ; then debts of record ; then debts under seal ; and lastly, simple contract debts, including, of course, bills, notes, and all acknowledgments of that description. Every superior debt must be paid in full before any inferior debt receives a farthing. It is right to say that the practice, in this respect, is not uniform, a diversity existing between the administration, by an executor, of legal assets, and of equitable assets, things between which the difference

is purely arbitrary. How is it that two separate systems of law, not merely separate in their procedure, but very frequently conflicting in their principles, still co-exist in such an age as this, and in such a country as England, must, I think, excite the astonishment of every foreign jurist. But so it is, and so it will, probably, remain ; for landmarks are not to be removed, and time makes even absurdities respectable. To return, however, to what I was saying relative to the administration of assets in England, I have to observe that the rule is that while legal assets are to be applied in the order which I have already mentioned,—equitable assets,—(by which is meant property recoverable only through the intervention of a court of equity), are to be divided, share and share alike, amongst all the creditors, without any preference or priority. Still, however, as by much the greatest proportion of the property left by deceased persons consists of legal assets, the correctness of my general statement is sufficiently borne out. It is further to be kept in mind that in England the estate of a deceased person cannot be made bankrupt or insolvent. By the Insolvent Ordinance of this colony, such an estate may be surrendered like any other ; but no such power or privilege exists in the Mother Country, where such an estate must be administered, as far as it has legal assets, upon the scale of priorities, which I have already pointed out. Now, if it be not contrary to natural justice that an unregistered bond creditor in England should be paid in full out of the estate of a deceased man before inferior creditors get anything, why should it be contrary to natural justice that a registered bond creditor in this colony should be paid in full out of the estate of an insolvent man before inferior creditors get anything ? Again, may it not be apprehended that if general mortgages were abolished to-morrow, the whole of the evils which are ascribed to them might be accomplished in another shape ? May not particular creditors be favoured by being placed first in the race for execution ? In other words, if you do away with general mortgage, may not the ingenuity of parties substitute the judicial in its stead ? A debtor in England may give a particular creditor a warrant of attorney ; in Scotland a decree of registration ; in this colony an act of willing condemnation,—and by that means enable

that particular creditor to lay on his execution, that is, to obtain a judicial mortgage before certain other creditors not similarly favoured. I know nothing to prevent a London merchant from saying to a London shop-keeper, "I will not supply you with the wares you want, unless you give me a warrant of attorney for confessing judgment." I know nothing to prevent that London merchant, (subject to the uncertain operation of a supervening bankruptcy) upon the least alarm, from entering up his judgment, issuing execution, and sweeping the debtor's whole estate into his pocket. I know nothing to render it necessary that that London merchant's debt should be the most righteous debt, or should be the oldest debt, or anything else than the most favoured debt. I know nothing, therefore, which entitles me to say that the evils which are deplored in this colony may not, in a different way, be also experienced in England. I throw these matters out for the consideration of the Council and, through the Council, of the public. There may be something more in these general bonds than, at present, meets my eye. That they are not, although registered, made, in practice, sufficiently public, may be true; and, if so, a very simple process might obviate that objection. But I confess that, subject to farther information, I am not disposed, just now, to go the length of total abolition. If, however, the Committee should determine on destruction, the task would be easily accomplished. The code Napoleon has performed it, and performed it in four words,—“movables cannot be mortgaged.” In this colony their fate might be settled by a sentence almost equally concise.

I have now reached the last topic on which it is necessary that I should touch. Though last, it certainly is not least. The Council will understand, at once, that I allude to the Insolvent Law. Upon this head I shall be extremely brief in my remarks. I can neither forget the length at which I have already trespassed, nor the additional length to which a discussion of any particulars connected with Ordinance No. 64 would inevitably lead me. One or two general remarks, then, and I have done. I begin by bestowing my hearty commendation upon the general

principles and provisions of that Ordinance. I conceive that it is, upon the whole, as well calculated to secure the great objects which such a law should have in view,—namely, giving everything to the creditor except the debtor's unprofitable suffering,—as any similar system with which I am at all acquainted. Still it cannot be denied that dissatisfaction does exist. Part of this dissatisfaction is the natural language of men who have just lost money, for there is not so severe a critic in the world as a disappointed creditor. Nothing will persuade him but that the law, and that alone, debars him from the sublime delights of twenty shillings in the pound. Do I, therefore, maintain that the Insolvent Law is susceptible of no improvement? Far otherwise. If that were my opinion I should not now be moving for a Committee to enquire into it. But even admitting the law of this colony, in its practical operation, to be as bad as it is sometimes said to be, we have companions in misfortune, and are not all alone unhappy. There is an outcry against the Insolvent Law of England, and there is an outcry against the Insolvent Law of America, as well as an outcry against the Insolvent Law of this colony. I found a statement the other day in a speech of Mr. Webster—the great American Statesman, Orator, and Jurist,—to the effect that a Committee of the House of Commons, which reported upon the working of Lord Redesdale's Insolvent Act, which expired in 1818, found that the estates administered under that law had not divided on an average a single penny in the pound. I believe that the experience of this colony, for the last twelve years, would not exhibit a result altogether so disastrous. But much may be considered in the way of addition to the present law, and something too, perhaps, in the way of alteration. Whether opportunities are still left to insolvents to make away with property, which opportunities can, in any way, be cut off,—whether Trustees of Insolvent Estates are generally selected from the parties whom it is most desirable to choose from, and whether the mode in which Trustees are now remunerated be the most expedient,—whether the evil of uncertificated insolvents carrying on trade is capable of being effectually checked,—whether there are not many things connected with an insolvent's dealings

which should justly subject him to punishment, over and above the acts now described as constituting fraudulent insolvency,—whether some machinery should not be added to meet the exigency of a class of cases which has lately come before the court,—I mean the case in which all creditors who have proved being paid in full, the estate is, at once, withdrawn from sequestration,—all these topics and many others which might be mentioned appear to me to demand what I have no doubt they will receive, the patient and attentive consideration of the Committee.

Let no one, however, expect that legislation can work wonders. Let no one expect that the law can ever reconcile things as opposite as light and darkness. Men do not gather grapes from thorns, nor figs from thistles; and until they shall do so, we may rely upon it that as long as our merchants make their sales with reckless and indiscriminating eagerness,—while their travellers,—those missionaries of Mammon who compass sea and land to make one proselyte,—are abroad in all directions,—while to do an extensive business is the leading object after which all press emulously forward,—so long, will it be found that no system of Insolvent Law, which ever has been or which ever will be devised, can realize for those engaged in commerce, advantages so opposite and incompatible as all the profits of a dashing credit trade, and all the security of cash transactions. But still an evil which cannot be removed may yet be mitigated. I trust, that in the labours of the Committee which I contemplate, some such mitigation will be found. At all events, it will be in our power to evince that the murmurs of the public are neither unheard nor unheeded by this Council,—that we do not shrink from the labour of investigating the grounds on which complaints are based, and that if we do not act upon all the opinions which are prevalent out of doors, it is not from any indisposition to give to them and their supporters a candid and impartial hearing. Influenced by this feeling I now beg leave to move :—“That a Committee be appointed to enquire into the particular operation of the following branches of the law of Debtor and Creditor in this Colony, viz. :

First,—The system of Tacit Hypothecations; and more par-

ticularly those imposed upon the property of Tutors, Curators, and others, in favour of parties to whom they have become indebted in their several capacities.

Secondly,—The system of General Mortgages or Bonds,—and

Thirdly,—The system of Insolvent Law. And to report whether any, and if so, what improvements, seem to be required in any of the said branches of the law, or in any other branches of the law immediately connected with the same, or any of them.”

ON INFANT SCHOOLS.

[*Public Meeting, Cape Town, April 14, 1841.*]

The Hon. Mr. PORTER said :—My hon. friend who has just sat down seems to take it for granted that I have come here to-day prepared to make a speech. Sir, in this expectation my hon. friend is, for once, mistaken. I have no speech to make. A few plain words, indeed, I am anxious to speak, but nothing more, and if I thought that anything more was looked for, I should be silent. For in truth, Sir, there is nothing so valueless as mere spouting. Little as it costs, it always costs much more than it is worth. We are assembled here for work, and not for play, and our object is altogether practical. An institution of unspeakable importance to Cape Town and the whole colony is sinking for want of public sympathy and support. Under such circumstances those who can do, perhaps, but very little, should yet do all they can. Influenced by this feeling, I am here. When an establishment like that which brings us now together stands in so much need of assistance, the man who would not stretch forth an arm to raise it up, deserves that his right hand should forget its cunning; when a word spoken in season might possibly be of service, the man who would refuse to speak that word, deserves that his

tongue should cleave to the roof of his mouth. Sir, upon the general question of Education little need be said. That question has been long before the public here, and may be considered, at least theoretically speaking, as completely set at rest. It would appear, indeed, that an attention to the educational necessities of the poor is not, in this colony, a thing of yesterday. When just about to leave my office for this meeting, a friend at the other end of the hall, one to whom the records of our colonial history are probably more familiar than they are to any other person, shewed me a striking passage in a forthcoming publication of his own, which clearly proves that some sound principles upon the important subject of Education were promulgated by the Dutch Government centuries ago. But, coming down more nearly to the present times, we find that the cause has been advocated with an ability too distinguished to leave room for much additional support. You have yourself, Sir, favoured the meeting by reading a part of Mr. Fairbairn's article of this morning, in which the claims of this institution are powerfully urged. That article is only one of a very long series. For ten years and upwards, the *Commercial Advertiser*, with untiring energy and perseverance, has ceaselessly continued, in season and out of season, to assail the heads and hearts of the community with a succession of earnest, eloquent, and argumentative appeals, in behalf of general Education. And, in connexion with this subject, Sir, I may, I think, be permitted to allude to the several excellent addresses delivered, at the opening of their respective schools, by some of the Government teachers recently appointed,—addresses which have attracted a good deal of attention, and which have triumphantly established the all important truth that a good education is a great blessing. Argument, therefore, is not required. The cause is tried,—the evidence is closed,—the advocates have spoken,—public opinion has pronounced its unanimous and irreversible decree,—and that decree is, “let the poor be taught.” Sir, in one point of view this unanimity is cheering. It is cheering to find that none of the old sophisms which, in Europe, struggled long and loudly, and which were not shamed into silence without great difficulty, are heard to whisper here. The sensual sophism which

teaches that because Education is not meat and drink it is therefore nothing, has, with us, no advocate. It is true, indeed, that the animal wants must be attended to ; and it is true, moreover, that Education has a constant tendency to supply them more abundantly ; but even setting this apart, I never could be convinced by Cobbett (and by the bye, the Hampshire clodpole should have remembered what he himself owed to the education which he ridiculed), that the chief end of man is to gorge fat bacon. The slavish sophism which says that Education leads to discontent and danger, and that, as knowledge is power, it will prove to be a power for disorder and destruction, does not, I think, venture now to raise its head. Sir, in your opening address, you have yourself adverted to, and exposed, this fallacy. You have adduced the memorable instance of the French Revolution. In France the mass of the population had been kept in utter darkness, but Samson's blindness, instead of averting, only aggravated the vengeance which he ultimately took on those who had put out his eyes. The stupid sophism which cries out that education will turn the world upside down ; that it will lead the lower classes to forget themselves and their proper situation, and that we shall soon have no more hewers of wood and drawers of water, has, in this colony, no adherents. Sir, I call this sophism a stupid sophism, for who does not see that vanity and presumption are the fruit, not of any general advance, however great, but of some real or supposed individual distinction, however slender ? No man upon a railway ever dreams of being proud of his extraordinary speed, because he and all his fellow-travellers with him are rushing along at the rate of forty miles an hour. On all these matters we are all unanimous, and certainly, in one point of view, as I have said, the unanimity is cheering. But there are two sides to everything, and this very unanimity may have an aspect not quite so desirable as that which it, at first, presented. Where all are unanimous, is it not sometimes found that all are apathetic ? Zeal never burns so brightly as when it is inflamed by opposition. I could almost wish that the cause of public instruction had its avowed and

determined enemies. An anti-Education Society, for instance, would be worth any money. With such a stimulant to fire our flagging zeal, I can assign no limit to the resources which would be furnished by many who, at present, look idly on and render no assistance. Sir, it is a humiliating reflection, but one, I fear, too well sustained by general experience, that principles may be too pure to produce their practical effect on the public mind ; and that until they are adulterated with some admixture of party spirit or other comparatively base ingredient, they never become current with society at large,—just as gold may be too pure to serve the purposes of mankind, and never becomes fit for circulation until there has been added to it a certain portion of alloy. Sir, I am unwilling to believe that the principle at which I have thus glanced, is an all-pervading principle. For the credit of the colony, I trust that it is not. It were, indeed, a miserable and a melancholy thing to think that the public generally cannot be raised to the height of so great an argument as that which we are this day assembled to support, from any motive more elevated than the paltry one of party feeling, and that it is only through envy and strife that the poor can have this gospel preached to them. Sir, the duty is plain, practical, and of paramount importance. It meets us in the public streets,—it follows us to our own homes. There is no station in society, no relation in life, to which its warning voice is not addressed. If you ask me how you shall best fulfil your obligations as good heads of families ? I answer, “Educate the poor,” because, by so doing, you are rearing up a class of domestics,—orderly, obedient, respectable, intelligent,—domestics with whom your children must come in contact, and whom they may touch without contamination. If you ask me how you shall best fulfil your obligations as good citizens ? I answer the second time, “Educate the poor,” because, by so doing, you are putting tools into the hands of talent,—calling forth unconscious power,—bestowing the invaluable habits of attention and perseverance,—and prompting to that energy and enterprize on which the progress and prosperity of the colony must, in a great degree, depend. If you ask me how you shall best fulfil your

obligations as good Christians ? I answer the third time, " Educate the poor," because, by so doing you are getting ready the soil for a still richer culture ; and fitting it for the reception of that precious seed which, without such previous preparation, must fall, as by the way side, exposed to all the fowls of Heaven ; but which, with that previous preparation, may, haply, bring forth fruit, some thirty some sixty, and some an hundred fold. If then, Sir, the great principle be clear,—if schools for the instruction of the poor, in general, are worthy of all commendation and support, what shall we say of Infant Schools ? You perceive, Sir, that I am still following in your track,—illustrating, as well as I can, the topics touched on in your opening speech, and endeavouring to glean a field so closely reaped that I can scarcely hope to be rewarded by a single sheaf. But I cannot hesitate to repeat, in order to adopt a sentiment which you threw out, and to express my strong conviction that, of all the machinery which has been devised for the education of the lower orders, none is more efficacious than that of Infant Schools. Sir, you have spoken of the opening of the South African College a day or two ago. I also had the privilege of being present there. I call it a privilege, and, justly, because, in addition to much other excellent matter, I had the advantage of hearing from Dr. Adamson a discourse which I willingly digress in order to record my admiration of—a discourse of which the profound and comprehensive meaning would have found acceptance with Bacon ; of which the broad, unsophisticated common sense would have satisfied the practical sagacity of Locke,—of which the high, imaginative, eloquence, as, ever and anon, the widening circle of science stretched far into the infinite, and philosophy became identical with poetry, would have filled the ear and mind of the immortal Milton. Sir, I congratulate the colony upon the auspicious opening of the College, and bid it, from my heart, Godspeed. But still, if I were obliged to compare the College with the Infant School,—if, instead of being natural allies, those institutions were natural enemies,—if one of them must be taken and the other left, I should, for my own part, take the Infant School, believing that more good may reasonably be looked for in that quarter. And yet, strange to say, there is not a

little misconception abroad relative to these things. At home, I have heard schools for infant learning talked against, as I have heard factories for infant labour talked against. Little children, it is said, "were never made to be shut up in schools,—they grow dull and dismal in their prison-house,—defer until a more convenient season those irksome things called tasks." Now, this sounds well enough, for no one wishes to darken even with a single cloud the dawning of existence. But all such objections are based upon two palpable fallacies. They suppose, first, that learning must be made a toil to every little learner. How far this notion is a correct one we have had to-day an opportunity of judging. You saw the look and bearing of the children,—what animation! what eagerness! what activity, both of mind and body! The truth is, that an Infant School, when properly conducted, instead of entailing the slightest suffering, is made the means of gratifying a strong instinct. The mind is never either stretched or strained, but merely assisted in developing itself, and furnished with the objects best fitted for its exercise. But the objections alluded to farther suppose that the education of a child may be postponed at pleasure. This, however, is impossible. You may, indeed, postpone giving him a good education, but by so doing, you will, in all probability, only allow him to get a bad one for himself, since an education of some sort or other he will assuredly obtain. You cannot keep it from him. It is a law of nature that we shall always be in training. The period of education is not some ten years, or so, cut out of the remainder of our lives; no, it begins in the cradle and ends only in the grave. But it is in the commencement of existence that the most important work is to be done. It is then that the great foundations of life are laid, and that the character assumes a form which subsequent events seldom alter in essentials. Profoundly, as well as poetically, does the greatest poet of the age (will the admirers of Byron pardon me for speaking thus of Wordsworth?) declare that

"The child is father of the man."

You remember the theory of Bonaparte, that remarkable men

have always been the sons of women of distinguished talents. I believe that the fact agrees well with the speculation. And how is the thing to be accounted for? Not, certainly, by any fanciful physiological solution, but by the simple circumstance that the man was made in those sweet, early days, when the child went in and out beneath his mother's eye. Now, to furnish to all children that sort of education which a superior woman would wish to give her own, is a great object of a well-conducted Infant School. I am by no means clear that even for the children of the rich, such Seminaries would not be exceedingly desirable. Amongst the rich, also, will be found mothers who have not the necessary leisure, the necessary skill, and the necessary firmness, for the due performance of the task imposed upon them. But, however it may be with the rich, with the poor the case is clear. Sir, you have already directed the attention of the meeting to the contrast which is presented by the child to whom the doors of the Infant School open, and the child against whom those doors are closed. That contrast is marked, undeniable, decisive; appealing to every head that thinks, and every heart that feels. I shall not now speak of the outcast and his melancholy lot, but turning to his more favoured companion, how all-important, to him, does the Infant School become? To surround him with virtuous associations, and remove him from associations of a character diametrically opposite; to form his moral sentiments by gently encouraging what is good, and gently repressing what is evil,—to give him ideas, and, still more, to give him principles; to bestow on the religious tendencies of his nature a due direction; to keep watch and ward against what will be found, if I mistake not, the two great besetting sins of childhood, inordinate selfishness and indifference to truth,—such are objects proposed, and such the advantages to be gained by every well-conducted Infant School. Sir, I have said enough in the way of general remark. A word or two more, and I have done. I ask this meeting, and through this meeting, the Cape Town public, “Is this Society to perish!” Is the ten years war, which has here been waged with sin and ignorance, to be disgracefully abandoned? If I am to look to the

recent history of the Institution, I must anticipate an unfavourable answer. Its funds have been rapidly diminishing, and with its funds, its pupils. Where you had formerly 200, you have now but 60, and still your Treasurer is largely in advance. Is then, I ask again, this Society to perish? Sir, it will not perish; on the contrary, it will spring up with youth renewed, if we can, this day, succeed in awaking some portion of the public sympathy. I do not believe that any paltry, pitiful, considerations of economy have had the slightest influence in starving the subscription list, for contributions too trifling to be felt by any one, would, if widely spread, amply supply all our reasonable necessities. Our enemy is not economy, but indifference; and, for my own part, I have great confidence in the public if you once can shake it, rouse it, make it think. Sir, I do trust that this meeting will accomplish the noble end in view. After what we all have witnessed from the children to-day, it would be an insult to entertain a doubt. The advocates of antiquity, when pleading in behalf of infants, were accustomed to present their clients before the judges, in order to add to the effect of their passionate addresses. Our colder times and temperaments reject, in general, such instruments of persuasion, but if it were at all allowable to have recourse to them, surely we might well point to the children whose exercises and attainments have amused you here to-day, tell you that their fate is in your hands, and beseech you to take pity on them. Having done so, we may close our case. Sir, I may be too sanguine, but I do anticipate success. The liberal arrangement on the part of Government which you have already explained, is, of itself, a powerful inducement. Mercy, in this instance, is, in a peculiar sense, twice blessed. Every one pound from the public is two pounds to the schools. But I feel persuaded that even this inducement could, if necessary, be dispensed with. You are bound to sustain this Society by many considerations. You owe it to those whose labours and liberality have hitherto supported it, through good report and through evil report, not to allow it now to sink. You owe it to the reverend and venerable gentleman (Rev. Dr. Philip) who sits near me, to step forward. Ten years ago he gave being to this Society,—a small

beginning, but capable of indefinite development ; the grain of mustard seed, which might become a great tree ; the little leaven that might suffice to leaven the whole lump ; the small cloud, at first no bigger than a man's hand, which might gradually spread itself over the horizon ; and from whose bosom might gently descend the fertilizing rain. A great orator of my own country, speaking of a vast but short-lived, political advantage, which he had himself bestowed on Ireland, once exclaimed (and the image, from its suddenness, simplicity, and completeness, has been thought one which Dante might have been expected to strike out), " I sat by its cradle,—I followed its hearse." I trust that the reverend gentleman to whom I have referred will not be obliged to adopt the words of Grattan, as applicable to this Society, nor doomed to feel again, in his old age, as if another of his children had gone before him to the grave. You owe it to the little creatures, who stood before you here to-day, to continue to them the inestimable blessings which they now enjoy. Finally, you owe it to yourselves to avert the deep disgrace which must inevitably settle down upon the Cape, if this effort for duty and humanity must be, at last, relinquished. Sir, we *shall* avert that deep disgrace. The good ship will right again, and go her course steadily. I see around me the mariners who have manned her since she was launched, who will not desert her as long as her timbers hold together ; who will lash themselves to her deck, if necessary, and shrink from neither the battle nor the breeze. I trust that she is destined to make her onward voyage under smiling heavens and through friendly seas, and that she will reach safely and successfully the desired haven. But if, unfortunately, her future fate is to be different ; if storm and darkness should gather round her track, or direct hostility beset her solitary path, her crew will stand to their guns, and cry, with the American captain in the last war, when his sails were shot away his mainmast shivered, his men were scattered dead around him, and he himself lay wounded on the deck, " Don't give up the Ship ! "

ON LABOUR, ROADS, AND MAGISTRATES.

[*Legislative Council, 4th October, 1841.*]

The ATTORNEY-GENERAL said :—It had so happened that in the course of that desultory, but not, by any means, impertinent conversation, three of the greatest wants of the colony,—he meant the increase of our colonial labour; the improvement of our colonial roads, and the extension of our colonial magistracy, had been severally introduced. These were questions of a very grave and important character, and he would have wished before meddling with them, to have had some time for previous reflection, but as they had thus accidentally come before the Council, he would offer upon each of them some general remarks. There could be no doubt, whatever, that to obtain a supply of liberated Africans from St. Helena would be, if practicable, a most desirable measure; but he agreed with his hon. friend, the Collector of Customs, in thinking that our chance of getting any number of these people was by no means promising. Certain it was that some 1,800 or 2,000 Negroes were there to be disposed of, but why exactly they so remained undistributed was not so clear. It might be that a legal difficulty had arisen, and that nothing would be done with respect to the persons in question until that difficulty had been removed. His Excellency had adverted to doubts which were entertained relative to the competency of the court by which slavers were condemned at St. Helena. Those doubts arose from the fact, that that court had been appointed by Sir Thomas Middlemore in his capacity as Vice-Admiral of the Island, and not, as was the general practice, by the Queen. The Chief Justice of St. Helena was of opinion (and he, the Attorney-General, certainly conceived that that opinion was supported by very strong reasons), that the Vice-Admiral was rather an official than a judicial character, and that it was not competent for him to try, or to depute others to try, such a class of cases as that under the Abolition Act of her present Majesty, which were by that Act to be

dealt with by what is therein described as a Vice-Admiralty Court. However, as the Act of Parliament had been transmitted to the Governor of St. Helena, and as other communications had been received by him from head-quarters, which clearly supposed the existence at St. Helena, of a competent Vice-Admiralty Court, His Excellency had determined to act as it seemed to be expected he should do, and he had, in consequence, appointed a tribunal which had adjudicated upon a number of Portuguese slavers. He, the Attorney-General, did not know whether the delay which had taken place in doing anything with the liberated Africans was connected with the matter to which he had just adverted, but if, as was not improbable, they were kept over awaiting the decision of the High Court of Admiralty in England, it might be found that there was sufficient virtue in the "law's delay" to protract the present state of uncertainty, until our application (should we make one) would have time to reach the proper quarter. But even supposing that we were not too late to prefer our claim, had we any good reason to hope that it would prove successful? It seemed that Demerara was in the field against us, with a fund of £50,000, and already possessing what this colony was only looking for—a steamer.

The GOVERNOR said that his hon. and learned friend had misunderstood him. Demerara had proposed to bring Africans from Rio, but not from St. Helena. The Mauritius was our competitor as regarded the latter.

The ATTORNEY-GENERAL thanked His Excellency for setting him right, and congratulated the Council upon not being brought into immediate conflict with a rival so powerful, both in pecuniary and political resources, as Demerara would have been. But when he recollected the extraordinary efforts which were now made throughout the principal West India Possessions to obtain labour; the fact that supplies were sought for in quarters so opposite and remote as India and Ireland, and the little likelihood that what was passing at St. Helena would be overlooked in the quarter to which he was adverting,—he could not shut his eyes against the probability that we must still be

prepared for great, perhaps overwhelming, West Indian competition. Still, however, he would assume that we might have 500 or 1,000 free blacks from St. Helena, by making fit provision for them, and then he came to ask in what manner was that provision to be made? He (the Attorney-General) believed that there would be found, not perhaps insuperable, but yet very formidable, obstacles in the way of our proceedings. Would the colonists give their money to bring labourers to the colony, to whose services they should have no right, on whom they should have no sort of hypothec or lien, but who were to be distributed by the Collector of Customs (should the task be allotted to his hon. friend), to those subscribers alone whom, in his unfettered discretion, he should deem the fittest and most proper? That this freedom of selection must be scrupulously observed, and nothing like a claim to the Negro for a moment recognized, was a principle so clear and decided that it would be a waste of time to urge or argue its necessity. Again, the time for which those Negroes could be properly contracted was a further matter for consideration. Upon this subject his hon. and learned friend opposite (Mr. Cloete) had slightly touched, but had observed that whether or not Africans condemned at St. Helena, for the purpose of being liberated, were to be dealt with, in this colony, according to the plan prescribed by the abolition statutes, in the same manner as if they had been adjudicated upon in the Vice-Admiralty Court of this colony, was a question on which he would offer no opinion. It was one, however, on which he (the Attorney-General) could not hesitate to state his views, and he had no doubt whatever, that his hon. friend, the Collector of Customs, had no official connexion with any Negroes introduced here under such circumstances as we were now contemplating; that Negroes condemned in another colony were, in this colony, in no different situation from Negroes who never were condemned at all; that the powers with which his hon. friend were invested flowed exclusively from a condemnation in the Court of this particular colony, and that, consequently, the term for which any Negroes, received from St. Helena, might be contracted or apprenticed, would not be governed by the provisions of

any of the Abolition Acts. If those provisions did apply, his hon. friend—in the exercise of a discretion reposed in him,—a discretion for the exercise of which he was responsible, and which every one knew had been heretofore most wisely governed,—might contract an adult for any period of service not exceeding seven years. His hon. friend, no doubt, feeling that he was, in fact, the guardian and protector of the persons entrusted to his care, and as such bound to make the best bargain he could for their advantage, had never approached the legislative limit, finding that a time considerably shorter would be more advantageous to the African. But still, he had made contracts for Negroes condemned in this colony, which were to last for three years. Could he do the same for Negroes condemned at St. Helena, and afterwards brought here? The general Master and Servant's Ordinance still awaited the royal approbation. The local Ordinance respecting native foreigners did not apply to this case. The general principles of law applicable to master and servant could not safely be applied to such parties as were now in view. Under these circumstances, he considered that his hon. friend would probably be of opinion that he ought to conform himself implicitly to the Order in Council of September, 1838, which had formed the basis of the Master and Servant's Ordinance in this colony, and which certain circular communications from the Secretary of State, originally framed for the West Indies, but forwarded also to the Cape, had laid down as the rule to which all Governors and other officers, at whose stations any Africans might happen to be landed, should invariably obey. If his hon. friend should feel himself constrained to adopt this view, he could not contract any man for a longer term than twelve months. Would this term answer the purpose of those gentlemen who now spoke about subscribing? His hon. friend opposite (Mr. Ham. Ross) and his hon. and learned friend near him (Mr. Cloete), knew much more than he did of the views of the agriculturists and others by whom this matter had been agitated, but he was led to think, from information which he had derived from some gentlemen who had honoured

him with a call upon the subject, that very few persons in the colony would pay a man's expenses from St. Helena to the Cape in return for only one year's service. He hoped, not merely that he was wrong in this notion, but that all the other difficulties which he anticipated would be found equally imaginary, and that a species of labour which was, he thought, peculiarly fitted for this colony, might be introduced as copiously as possible. Upon the practicability of importing the European labourer, he had always been sceptical; and what he had observed when travelling through the colony about this time last year, had not, speaking generally, tended to remove, but to confirm that scepticism. But, for the liberated African, he did not conceive that there was any possession of the Crown so peculiarly fitted, with respect to climate, healthiness of employment, and the tendency which, placing them as servants, domestic or agricultural, in respectable families, inevitably had to improve and civilize them.

He now came to the project of his hon. friend opposite (Mr. Ross), with regard to our roads. Assuming that labour might be got from St. Helena, his hon. friend proposed that it should be brought here by public subscription, and placed at work upon some of our roads until the raw recruit should be drilled a little and be taught the use of the axe or shovel. His hon. friend, however, had not adverted to one important consideration, namely, to the fund which was to supply with necessaries, and, also, probably with some small wages, the imported labourers who were to be thus employed. Was this fund, also, to be subscribed for? If so, was the colony disposed, or, indeed, able to raise it by subscription? And, on the other hand, if this fund were to be supplied by the colonial revenue, was that revenue in a condition to bear any burthen of the kind? In all probability his hon. friend would hereafter be able to point out some method of working out his plan, and his (the Attorney-General's) object was not by any means to throw cold water upon a project which, if practicable, had much to recommend it, but merely to draw attention to certain important matters which ought not to be overlooked. The condition of our roads was, indeed, deplorable. Until

something were accomplished in that direction, this colony could never take its natural and proper place. The difficulty was to devise some practicable mode of doing what every one felt ought, if practicable, to be done. Different schemes, more or less feasible, had been suggested, but he (the Attorney-General) would venture to give it as his opinion, that an equitable assessment, or to use at once the most unpopular word in the language,—a tax, upon all immovable property, as well in the towns and villages as in the country districts, to constitute a separate fund from the ordinary revenue, and to be judiciously and impartially expended upon the public roads of the colony, would be decidedly the most just, and at the same time the most effectual mode in which the existing evil could be met. Whether the colony was yet ripe for such an effort he could not say, but without some effort, was it not clear that the evil would, day by day, be getting worse, and that by putting off what must at some time be attempted, we only added to the difficulty of ultimately doing it.

Quitting, for the present, with these remarks, the subject of roads, he should proceed to say a word or two about the remaining question of the three which had been stirred to-day,—the magistracy. It appeared to him that before going into Committee upon this subject, the Council should fully understand what it was which the Secretary of State desired them to consider. If, for instance, the Secretary of State wished to know whether or not, in the opinion of this Council, the magistracy was sufficiently numerous to meet the wants of the public, the Council, he was sure, would be compelled, at once, to answer *no*,—and the negative would find an echo in every quarter of the colony. He did not think that there was in any one district any one magistrate too much. His hon. friend opposite (Mr. Cloete, sen.), in his remark to-day might he understood as saying that there were too many magistrates at this end of the colony; that in fact, in some places, you could not stir out without stumbling over some such functionary. But he (the Attorney-General) believed that the evil was, not that any place had too many, but that many places had too few. The case of the Hantam had been mentioned

again by his hon. friend to-day, as its claims had been formerly urged with much force by his hon. and learned relative, and there could not be a doubt that justice was, in the whole of that tract of country, rendered almost inaccessible by distance. No doubt, as the Secretary of State observed in his despatch which had just been read, a thinly populated region must necessarily have its seats of justice comparatively difficult of access. It would be absurd to expect that Clanwilliam could be furnished with magistrates like Middlesex. But still an inconvenience might, perhaps, be abated, which could not be entirely removed ; and he knew no reason why certain places should not get magistrates, except that the Colonial Government wanted means to pay them. Again,—did the Secretary of State wish to know whether or not, in the opinion of this Council, our magistracy was overpaid ? If so, the Council and the colony again would answer *no*. The magistracy now discharge important functions ; there is an idea entertained, by increasing their jurisdiction, of making their functions more important still ; and he, for one, would shrink from the responsibility of committing high judicial powers to a class of men, in circumstances so straitened as to subject them to the suspicion, if not to the temptation, of being corrupted. Upon this subject also, the Secretary of State had thrown out an observation which was as indisputable as the former one already mentioned, namely, that with regard to magistrates as well as all other sorts of public servants, your means of remuneration must be the limit of the ability which you can afford to purchase, but his Lordship's distinct admission that the administration of justice was the last quarter in which considerations of economy should be allowed to operate, when applied to the scale of salaries received by our colonial magistrates, would prove conclusively that those salaries could not safely be reduced. Did the Secretary of State desire the opinion of the Council upon the subject of the public usefulness and efficiency of the four special magistrates alluded to in his Lordship's despatch ? Upon this subject he (the Attorney-General) believed there would be no difference of opinion,—that all would concur in declaring that those gentlemen had deserved well of the colony by faithfully discharging the duties entrusted to them, and

that (so long, at least, as the present arrangement connected with their support was continued), their removal from their seats of magistracy would be a public loss. But behind these questions there were others of more difficulty. Did the Secretary of State wish to learn, through the Legislative Council, whether the colony was prepared to show how, with reference to finances exclusively colonial, the number of colonial magistrates could be increased? This would be a point not easily disposed of, and if his Lordship should further desire to know whether the Council was prepared to recommend that the four special magistrates should be added at once to the ordinary colonial establishment, in case the Home Government should discontinue the assistance heretofore bestowed, another point of some difficulty would be presented for consideration. He would further observe that as we were to have a committee upon the subject of the magistracy, he conceived that the question of their jurisdiction ought to be adverted to. Was their jurisdiction to remain as at present? or was it to be increased? and, if increased, was both the civil and criminal jurisdiction to be augmented? or only the latter? and, in either case, how far? These were matters to which he (the Attorney-General) had given already some attention, and before going farther he should like to know the opinions now prevailing in the Council upon the subject. There had been a Bill before Council some years ago, of which he did not know the exact fate——

A MEMBER :—It was withdrawn.

ATTORNEY-GENERAL :—Then, the question was whether that Bill might be again introduced, and, if so, what modification, if any, would be necessary, in order to remove the opposition which it had formerly received? It was certainly desirable that any inquiry to be instituted should be comprehensive and complete; leaving no important points untouched, and, if possible, unexhausted; in order that upon matters so intimately connected with each other as the numbers, the salaries, and the duties of our colonial magistrates, the Secretary of State might have fully before him the views which were entertained by that body to which he had himself adverted as the most competent to form a correct opinion,—a Committee of this Council.

1842.

ON PUBLIC BUILDINGS EXEMPTION BILL.

[*Legislative Council, March 21, 1842.*]

Mr. BREDA presented a Petition against the Public Buildings Exemption Bill, from the Commissioners and Wardmasters of the Cape Town Municipality, which he moved should be received.

Mr. Adv. CLOETE seconded the motion.

The Petition was read and laid on the table.

The ATTORNEY-GENERAL said :—As no Member of Council seems disposed, at present, to move the rejection of the Ordinance, I deem it proper to take at once the opportunity of explaining a little more at large than I did upon a former occasion, the principle on which I conceive the measure to be founded, and the reasons which, in my mind, render it imperative to pass this Bill. I think it right, considering the petition which has just been read, and the small municipal excitement which prevails upon the subject out of doors, to disavow in the outset, as well for myself as for every member of the Government, so far as I am acquainted with their sentiments, all hostility to Municipal Institutions generally, and, in particular, all hostility to the Municipality of Cape Town. The sentiments of so humble an individual as myself can be of little consequence to any one except himself ; but, such as they are, they are in favour of Municipal Institutions, believing them as I do to be a proper extension of the principles of rational liberty. In what more I have to say I shall not trench upon anything which I have now conceded. Differing from the petitioners who have so fitly come before the Council upon this occasion, I assert that the Bill now before us contains nothing which is in the slightest degree

inconsistent with the fullest enjoyment of everything which Her Gracious Majesty meant to grant when she bestowed upon this colony the boon of municipal self-government ; and I shall, I trust, demonstrate beyond the possibility of denial or doubt, that the provisions of this short and simple Ordinance are bottomed upon obvious principles of reciprocity and fair play, and that it proposes to take away from the Municipality of Cape Town nothing but a pretence for committing an injustice. That the Commissioners should not have their finances crippled, I admit. I rejoice to see and to avow that the Municipality is doing good. There is now going on before my very windows a good work which, if evidence of usefulness were wanting, would abundantly afford it. But the Municipality must do good to Cape Town at the expense of Cape Town, and the question which we are assembled to determine is, whether a certain given sum shall be taken out of the public purse of the colony at large, and put into the private purse of the Municipality of Cape Town, in order to be expended in ornamenting or improving the town, with which we all, as well official as unofficial, happen to be connected. Representing the great body of the colonists, as upon this occasion I think I do, I distinctly deny that this Bill takes anything away which was ever intended to be given ; and I assert as distinctly, that if this Bill be rejected, a principle will be recognized which will extend Municipal privilege beyond all reasonable limit, and give such bodies a right to plunder the rest of the community. (The Governor, hear hear.) This Bill has two objects, perfectly distinct. It proposes, first, to exempt the immovable property of Government from any general Municipal rate. It proposes, in the second place, to legalize the payment of a reasonable rate for water supplied to that Government. I implore the Council to observe that these two objects are, as I have said, distinct ;—that while the general rate is altogether repudiated, the reasonable rule that work done, in the way of water given, should be paid for, is absolutely conceded ;—and that he who runs and reads the Bill may see that there is no intention to compel any Municipality to draw water gratis for the supply of the public service. But let us take one thing at a time, and begin with

the general Municipal rate. Let us see what this rate is, and what it is for. I am about to offer no opinion relative to what is and what is not a legitimate branch of Municipal expenditure; but I know that the Commissioners and Wardmasters take an extended view of their right to apply the general revenue of the town. I am not aware that much distinction is taken between their right to apply the Municipal funds in their Municipal capacity, and their right to apply their private funds in their private capacity. At one time they considered the expediency of patronising a popular and public spirited literary undertaking, which, however, had no particular connexion with Cape Town; and although the project was afterwards abandoned, it was not given up I believe from any doubt as to authority. My hon. friend opposite (Mr. Ross) is an advocate for roads, and so am I; and I presume he would, as a Commissioner, grant money to make a road anywhere throughout the colony where it seemed to be urgently required. Observe, then, how essentially different this general Municipal rate is from a rate which is merely a reasonable return for so much water carried to one's premises. The public purse may well pay for water carried for the public service. But when the public purse is called upon to contribute to the general rate it is called upon to pay a tribute to a fund which is wholly indefinite in its application, instead of fairly paying for an article supplied. Now, the petition assumes, and it has been assumed elsewhere, that as the law now stands the Municipality is unquestionably entitled to levy this general rate. I am not prepared, as a lawyer, to assent at once, to this proposition. I will not indeed, argue this, which is a question of justice and expediency, upon the technical principles applicable to a mere question of law; but I may remark, in passing, that the law has been well settled in England, since *Magdalen College case*, reported in 11th Coke, that the rights of the Crown are never bound by an Act of Parliament except the Crown is expressly named. Now the Crown is not named in any of the Municipal Ordinances in this colony, and the conclusion from this is evident. But, as I have said, I shall not rest this case on technicalities. I have higher ground to take. No doubt

the words of those Ordinances, in reference to taxation, are very general. They embrace every church in Cape Town; they embrace every school in Cape Town; nay, they embrace, if rigidly considered, the immovable property of the Municipality itself. But as it would be cruel to tax churches and charity schools, and absurd to tax the Town-house, it follows that the general words of the law must receive a certain limitation; that such a limitation is required by every consideration of justice and expediency; and that the language of the Ordinance should be interpreted according to its meaning and intent. Churches and charities have been exempted by the Municipality. The question, then, is, shall the exemption stop here? The Commissioners have said that it shall; but I, upon the other hand, contend that those properties which they seek to rate, do themselves serve the Municipality so greatly, and are of such immediate and peculiar benefit to the inhabitants of Cape Town, that they ought to be considered as so dove-tailed into the Municipality, and so conducive to the interest of the town, that no thought of subjecting them to a further tribute ought ever to have been entertained. It has been supposed that the exemption which we claim must be grounded upon the Royal Prerogative. I mention this foundation of an argument for the purpose of stating that I do not deem it necessary to rest any weight upon it. The limits of Prerogative are not easy to define, and, moreover, I am not clear whether I am to look for them in Blackstone or in Voet,—in the law of the Mother Country which has acquired the colony, or in the Municipal regulations of the Colony acquired. This is, perhaps, a nice question, but I have not considered, and shall not argue it. But what is not given as an authority may be fairly adduced as an analogy; and, unquestionably, the general rule in England is, that all royal property,—not merely that which is enjoyed by the Monarch in his public and corporate, but that which he possesses in his private and merely personal capacity,—is exempted from all municipal taxation. If I am to look for the illustration of this subject, not to the law of England but to the civil law, I should not expect to find that what the free constitution of England

concedes to the Sovereign power is denied to it by the slavish maxims prevalent at Rome, or that the property of the Prince,—the *dominium eminens*,—could be subjected to municipal taxation. But the broad principle on which we rest our case is this, that the funds contributed by the colony at large ought not to be diminished by contributions made to particular localities. Look, for a moment at England, and see what they do there in all such cases. If there is one thing for which, more than another, the General Government might seem properly taxable, it would be, I think, for the support of that great national institution, a provision for the poor. But is Government property situated in any particular parish rateable for the support of the poor of that parish? No such thing. In England, never since the Act of Elizabeth was such a thing heard of; and, in Ireland, into which the poor law system has been by the 1st and 2nd of Victoria recently introduced, all public property is expressly exempted. By parity of reasoning, then, I am prepared to contend that the same just and equitable principle which exempts Government property from the poor's rate should exempt it also from what is neither so natural nor so righteous a burthen, namely, municipal taxation. But I go much farther, and I say that if fair play has any influence,—if reciprocity is a thing which is not to be on one side,—the Municipality of Cape Town ought not to claim this money from the Colonial Treasury; for I do not hesitate to assert that, upon a debtor and creditor account, fairly taken, the Municipality is greatly indebted to the colony at large, and that there probably is not, either in the Mother Country or in any of her colonies, a single Municipality which has so much done for it by the General Government which it might reasonably be required to do for itself. Take one strong instance. Is the expense of a police force in any given Municipality a Municipal expense, or an expense of the general Government? If principle be of any account, or practice have any influence, I answer that the expenditure for police is properly Municipal expense. I have taken the trouble to look through the Acts of Parliament connected with this subject in the Mother

Country, and I find it everywhere distinctly recognized that watchmen, police, patrols, and all that class of men, are to be paid out of the town treasury. I shall not now weary the Council by quotations and authorities, but I have here the books with me to prove if it be called in question, the correctness of what I say. Connected with the police who look after criminals is a magistracy to try them. No portion of the charge of the magistracy is borne by the Municipality of Cape Town. The whole of it is provided for them by the colony at large. Look also at the gaol. Boroughs in England have, in general, their own gaols, their own gaolers, their own turnkeys, whose charge they pay, together with the charge of supporting prisoners. But the Municipality of Cape Town, not content with getting all these advantages from the colony, wishes to tax the benefit bestowed, that is to tax the town prison. I might enter into minute calculations connected with these points and show a number of other advantages, direct and indirect, which Cape Town enjoys from being the seat of Government, and from having so many of its local wants supplied by the Public Treasury; but without doing so, I content myself with expressing my conviction that, on the foot of any account fairly taken between Cape Town and the colony, Cape Town would, upon all principles applicable to such a reckoning, be found to be justly indebted to the colony in between £2,000 or £3,000 per annum more than it at present pays. It is true that the Police Ordinance does not rigidly confine the services of the police within the limits of the Municipality, and that the Municipal Ordinance does not rigidly confine the contribution of the Municipality to the expense of the police to one-half of the annual cost. But who does not know that although the police may be called now to Papendorp and again to Green Point, their stated services are in Cape Town, and that more than four-fifths of their advantages are enjoyed by the inhabitants of this place? And are we not aware that, although the Legislative Council may apportion the shares of the police expenditure between Cape Town and the colony as they think proper, yet that an understanding has arisen, from which it might

not be easy to depart, that the Municipality and the general Government shall divide the matter equally between them? Upon this one item alone, I conceive that the general Government might reasonably require from the Municipality £1,500 per annum more than they at present get. If this be so, with what consistency can Cape Town come in and crave, from the colony at large, this rate which we have now in hand,—a rate which cannot reach, I suppose, beyond a wretched paltry pitiful £100 a year; a rate which it would be absurd to fight about, except that a just and honest principle is always worth the fighting for? But will it be said that Municipal Boards in colonies should be better off than Municipal Boards at home, and, therefore, that no argument can be properly derived from what exists in England. I can scarcely see the grounds for this distinction. But let us look to other colonies. I have here, in a Parliamentary paper which I was led to consult for quite a different purpose from anything connected with this debate, a correspondence between Lord Sydenham and Lord John Russell. In speaking of the Canadian revenue, Lord Sydenham observes that it will speedily be improved, seeing that the Municipal Institutions to be conferred upon Quebec and Montreal will relieve the general revenue from a charge of from 9 to £12,000 per annum, now paid for the police of those cities, but which cost those cities will thereafter bear themselves. Now, I do not pretend to be a better Whig than Lord Sydenham, or to be more attached to Municipal institutions than a statesman who was so anxious for their introduction into his government, that he entertained serious thoughts of resigning, because a provision which he had appended to the Bill for uniting the Canadas, in connection with the contemporaneous establishment of certain Municipalities, was not carried through at home. For the life of me, then, I do not see how what applies to Quebec should not apply to Cape Town; and why, when the Government here does not go as far as Lord Sydenham went, when, instead of charging the whole police expense, or nearly the whole, to Cape Town, we charge only one-half, and when a number of other boons and bene-

fits are conferred in the same way, the Municipality here should continue to cry "give, give." Sir, I now come to the second object contemplated by this Bill, the water rate. As I have already explained, this water rate differs from the general rate. It is an absolute and almost an unaccountable mistake to suppose that this Bill will have the effect of compelling Municipalities to supply water to Government free of charge. The intention is altogether the reverse. It is proposed to legalize and regulate the payment by your Excellency of every reasonable water rate. Am I inconsistent in desiring to grant a water rate when I desire to withhold a general rate? I think not. I think I have said nothing which is inconsistent with the propriety of making a distinct provision for two distinct cases. The practice in England can scarcely be ascertained with sufficient accuracy to form a guide. Before the Act for reforming corporations, most Municipalities were supplied with water through the instrumentality of public companies or private Acts of Parliament. At present, most of the machinery created by these private Acts has been destroyed, and the duties connected with them re-annexed to the various Municipal Boards, in whom are also vested the powers previously reposed in the various separate boards in reference to the levy of a reasonable water rate. The truth is, that when a rate is not for purposes indefinite in their character; when there is an immediate relation between the thing done and payment for it; when, if you did not pay the Municipality for carrying water, you should pay somebody else for doing so; a case for compensation at once arises, and the claim of the Municipality may be equitably recognized. Now it is not because this equitable principle is denied, but because it is affirmed, and because it is proposed to confer upon your Excellency the power of affirming it in an authoritative shape, by directing, in conjunction with the Executive Council, the payment of every just and proper charge, that this Ordinance has been framed as you now find it. It seems to have been assumed in an able and elaborate article in the last *Zuid-Afrikaan*, that because my hon. friend the Acting Secretary to Government communicated upon

the subject of a water rate with the Secretary to the Municipality ; and because the reasonable suggestions of the former were agreed to by the Commissioners, that therefore any legislative provision like the present must either be unnecessary, or be intended to abrogate the arrangement originally intended. Now, I am not aware that the Municipality ever communicated to my hon. friend their assent to his proposition. But waving that, and taking it to be ascertained that such assent had been vouchsafed, there are two answers to be given to the remark of the learned Editor. In the first place, if he had recollected when approaching the end of his argument what he had commenced that argument by stating, namely, that this bill extends to every Municipality in the colony, and not merely to Cape Town alone, he would have perceived that, although matters might have been so arranged in Cape Town as to need no legislation, yet that legislation might be needed elsewhere ; and, in the second place, it should have been remembered that the provisions of this Bill would strengthen your Excellency's hands, and enable you to carry fully out the arrangement with Cape Town in some more satisfactory and solemn way than by a few letters flying to and fro. The contract with Cape Town is not intended to be cut down, and I am aware of no disposition to depart from it a single inch. I have now said almost all that it occurs to me to say upon the subject of this Bill. Indeed I look upon it that the principles for which I have contended have been recognized by the Municipality itself. When a resolution to exempt public property from the Municipal rate was submitted to a meeting of Wardmasters, it was carried by a majority of thirty against a minority of seven. It is true, indeed, that when this resolution came afterwards before the Commissioners, it was then rejected by a small majority, the suffrages being seven to five. Some Commissioners were absent when the vote was taken whose sentiments are supposed to be in accordance with the resolution ; but however that may be, I appeal to the judgment of the Wardmasters,—a judgment which my learned friend, who wrote the article which I alluded to just now, will be amongst the last to disregard,—and

deduce from the determination of the lower house of our Town Parliament an argument for me and against him. Now it is said that those who were against the imposition of the rate originally, as well Commissioners as Wardmasters, have had a new light let in upon them, and all, it seems, have conjoined in the petition against the present Bill, from which proceeding, it is a little curious to observe, the learned editor draws the conclusion that they are ripe for a Representative Assembly. But here I must confess that, as a friend of representative government, I cannot discern in the fact that some respectable gentlemen come here to petition us not to do what, elsewhere, they said it was right to do, and who now call that white which the the other day they called black ; who tell us not to do a thing which they were very ready to do themselves, any of those symtoms which indicate a peculiar ripeness for representation, if according to Montesquieu, virtue be the principle of democratic government, and if, according to moralists in general, honesty be an essential part of virtue. But adopting the idea of my learned friend, and supposing for a moment that this colony possessed a Representative Assembly, I say that the idea of submitting to such a demand as that which the Municipality of Cape Town makes (and be it remembered that Cape Town is the only Municipality which has made it), would be scouted without ceremony. If I had the honour, in such an assembly, to represent Graaff-Reinet or Colesberg, does anybody think that I should silently permit the colony to be saddled with such a charge ? No, I should say, "Gentlemen Municipalers,—you are doing very well ; I rejoice in your success ; go on and prosper ; but do not dream that my constituents will ever allow you to put your hands into their pockets in order to increase the elegance or promote the comfort of your own town. What you do, do quickly, do well, but above all things do it at your own expense." And I protest, Sir, I am almost tempted to imagine that the learned editor, in his indefatigable zeal for representative government, calls upon this Council to oppose this Bill in order that the colony may see how unreasonable, how unjust, how attentive to local feeling, how

negligent of the interests of the colony at large, this Council is ; and in order that the inhabitants in others quarters may see how necessary it is to save themselves from plunder by sending their own representatives to look after their own interests. With these remarks I confidently leave the Bill to its fate.

At a subsequent stage of the same day's proceedings, the Attorney-General said :

I wish to say a few words in explanation, and a few words in reply. With the exception of two of my honourable friends, whose opinions I always hear with great deference (Messrs. Breda and Ebdén), I do not perceive that any difference of opinion exists in the Council. It is conceded by my hon. and learned friend (Mr. Cloete) and my hon. friend opposite (Mr. Ross) that the principle of this Bill is good ; nay, that the principle of it is so obviously good that it is quite superfluous to legislate upon the subject. My hon. and learned friend thinks that the law is so clear against the Municipality that we ought to go to law, and then not merely defeat the claim, but defeat it, of course, with costs of suit. Now I differ from him here. I say that it is better not to go to law, which is tedious and expensive, but to go, upon a question of this kind, at once to legislation. And observe that my hon. and learned friend admits that if the decision of the Court should be for the Municipality and against the Government, it would then become imperative to resort to such a law as that now before the Council. Now, when once it is admitted that the judgment at law is not to be conclusive, I confess I see no reason for not resorting in the first instance to the swifter, more economical, and more satisfactory course of declaring how the law shall stand. This is a question of what is just and unjust, right and wrong. It is not so much a question of what the law is, as of what the law ought to be. It is not, therefore, to be technically treated. If the Municipality ought, in justice, to have this rate, then, if the law refused it, I should pass a law to give it to them. I admit that I may be justly obnoxious to one criticism of my learned friend ; that, I mean, connected with the time at which I rose to speak ; but to the correctness of another of his criticisms I do not subscribe ; and

I think that in treating of it he has betrayed some slight confusion of ideas. In the same breath in which my learned friend spoke about places of worship and the like, and seemed to recommend that they should be embraced in the Bill, he advanced a proposition about the *dominium eminens* with which such property could have no possible concern ; for surely the *dominium eminens* is not vested in churches or the like. But my learned friend has, in truth, said nothing about the *dominium eminens* of government which has any force. He has stopped short, and drawn no legal conclusion. He merely says that the *dominium eminens* is in the Crown. Who doubts that ? But the question is not whether the *dominium eminens* is in the Crown, but whether the *dominium eminens* in the Crown is legally subject to Municipal taxation. About the fact of ownership there is no controversy, and we have not advanced one inch towards the solution of the real question now before us, by ascertaining that the Crown is the owner of our public buildings. Passing now to the remarks of my hon. friend, the chairman of the Municipality, I find that he recommends Government to repair, as he did, to the Municipality, and that he has no doubt but that Government will experience all that liberality and kindness which, under similar circumstances, he experienced himself. But how is Government to go ? My humble friend is a substantial character, composed of flesh and blood. Government, however, according to my friend opposite (Mr. Ross) who told us so very energetically upon a late occasion, is nothing but "a phantom." Now, perhaps, a visit from such a phantom might fright the town from its propriety, and it is well to run no risks. But how is Government, which is made up of many persons, and constitutes a very complex idea, to drop in and make a morning call on the Municipality ? How is this complex idea to do what the Municipality Ordinance provides with respect to inhabitants who complain of the valuation or assessment ? Besides, to tell the truth, I do not think that Government should be called upon to approach the Municipality in the attitude of a suppliant. This is certainly a mere matter of etiquette,—not medical etiquette, nor military etiquette, but Municipal etiquette ; but I do consider

that Government cannot well take the course which my hon. friend has recommended. Coming now to my hon. friend opposite (Mr. Ross) it will be observed that his opposition to this Bill is connected with the water rate, where, as I have explained, this Bill can do no Municipality any harm ; and, moreover, connected with a water rate relative to the Ordnance Department. Now we have here no more to do with the supply of the Ordnance than with the supply of the moon. This Bill touches only property belonging to the Queen in her Colonial Government, which the Ordnance property does not. The Military and the Municipality must settle the question some other way. Both parties, I understand, are very confident of success in any legal proceedings which may be resorted to, and with respect to two such litigating parties, it would be cruel to prevent them from proving the pleasures of a lawsuit,—an enjoyment which neither my hon. and learned friend nor myself would dream or a moment of denying them, for if not ourselves in the battle, it would, as lawyers, be a pleasure to us to see the fight. Let it be remembered that whatever the claims of the Ordnance may be (and I cannot think that they have been so extravagant as has been represented here to-day), the Colonial Government does not require the Municipality to supply as much water as they may choose to want or waste, and pay nothing for it. We are willing to pay reasonably for such a quantity as we reasonably require. But it is said on the part of the Municipality, “We have every confidence in your Excellency ; but some other Governor may hereafter refuse to the commissioners all compensation whatsoever.” But if my hon. friend who made this remark (Mr. Breda) will but put on his spectacles again, he will see that this Bill compels no Municipality to supply water at what the Government shall consider a reasonable rate ; that this Bill leaves the right of every Municipality to give and withhold water at pleasure exactly as it stands at present ; that it does not pretend to define the limits which distinguish the arbitrary dominion over private property from the responsible administration of what is entrusted to the Municipality exclusively for public purposes ; that if the Municipality be bound to supply water to Government they are bound by some other law

than that now before the Council, and that all that the present Ordinance does is to provide the means of legally paying for what one receives and the other supplies. Whether the Municipality owns the water of this town, as my hon. friend opposite owns a bale of goods in his store, and may sell or not as it thinks proper, is not a question which this Bill was framed to settle. With reference to the remarks of the hon. friend beside me (Mr. Ebdon), who seemed to be a little at a loss for reasons to justify his opposition to this Bill, I need merely remark that the supply of water to the military, and all matters thereunto connected, have no more connexion with the question before Council than they have with the Emigration question ; or with the question of Usury laws ; or with any other question on which my hon. friend has, at any time, delivered his views in this room. I submit that there never was a greater destitution of argument than that which has been exhibited in this discussion, and I again call upon the Council to pass this Bill.

ON IMMIGRATION.

[*Legislative Council, March 26, 1842.*]

ATTORNEY-GENERAL :—Having given these subjects some little consideration, and having never before had an opportunity of expressing my sentiments upon them, at least at any length, I venture to offer myself to the notice of your Excellency and the Council thus early in the debate. Allow me, Sir, before proceeding farther, to record my perfect approbation of the tone and temper with which my hon. friend (Mr. Ebdon) has introduced the motion ; a tone and temper in every respect fit, and proper, and worthy of all commendation. It is with pleasure that I bestow this commendation ; but when I have done so, I feel myself constrained (and it is with pain I make this statement) to withhold all

further praise. For, considering the note of preparation which has been so long sounded,—the mode in which your Excellency's despatches have, in certain quarters, been denounced, and the withering exposure to which the various positions therein contained were to be subjected, I must say that I have been utterly amazed at the total absence of minute investigation, the complete destitution of those details so essential to the satisfactory discussion of the subject, and the singular paucity of everything like practical argumentation, which have been discovered, upon this occasion, by my hon. friend. Appreciating, as I do, his abilities, and knowing, as I do, his industry, I cannot but conclude that he had good reasons for not abandoning the region of lofty generalities, and that he did not attempt to go down into the depths of this question, because he was conscious that such a course would be unsafe. Sir, there is nothing easier than to deal in abstract propositions ; but to deal in abstract propositions is as unprofitable as it is easy. My hon. friend may lay down one hundred thousand indisputable general truths regarding labour, and wealth, and colonization, but those truths are not worth the breath which is consumed in uttering them, unless they are brought down from speculation, and embodied in some sober, rational, well-considered working plan. This practical aspect, most assuredly, the propositions of my hon. friend have not assumed ; nor do I find that he has advanced anything, even theoretically novel ; and I do not think that any individual who listened to his plausible address will carry away with him one new idea to increase his stock of speculative knowledge, much less one definite notion respecting the mode in which that speculative knowledge may, in this colony, be carried into action. In what I have to say I shall endeavour to consider the question more practically. And for the practical purpose of the vote this day, it might be sufficient to demonstrate, that were we to admit everything for which my hon. friend contends,—the advantages of English labour, and the splendid remuneration which awaits that labour on these shores,—we have yet no means to introduce it ; and, moreover, that my hon. friend has not pointed out the source from whence such means may be derived. Why, as practical

men, should we engage in long debate about what might be expedient or what might not, in case we possessed instead of a deficient a surplus revenue? Without denying that there is a want of labour in this colony, without denying that this colony is a place in which the labourer may come and do well, I should yet esteem it idle to affirm these propositions without some reasonable expectation of carrying them into effect. But still as the subject of English Emigration is now thrown in all its length and breadth before us, and as it is one of undeniable interest and importance, I deem it right, sworn as I am to consult for the public interest to the best of my ability,—and believing, as I do, that many rash and ill considered judgments had been formed upon the question,—to go into it with some particularity, and to give to this Council and to the colony my sentiments, such as they are, in some degree at large. Let us, Sir, in the first place, settle the natural and proper order of colonial expenditure. Throw back your eyes upon the time when Van Riebeeck first settled at the Cape, with his humble band of two hundred settlers. What were the first objects to which these people were called on to devote their money? I shall, of course, be sanctioned by the common sense of every man who hears me, when I say, that it would have been madness for them to devote it to the encouragement of immigration, how desirable soever it might have been to augment their little number. A colony commenced is a country commenced, and the first great duty of both must always be to establish and maintain those social institutions without which civilization must perish, and anarchy and barbarism make man a savage once again. There must be a form of government; a provision for the administration of justice; magistrates to punish crime; educators to prevent it; ministers to afford the consolation of religion; and a number of other appliances, too obvious to need being mentioned, and too indispensable to have their paramount utility denied; amongst which may be reckoned those establishments referred to by the Secretary of State in the despatch which your Excellency read a portion of to-day, and in which this colony is lamentably deficient,—

proper gaols for securing criminals. Who will deny that these things are the first and most essential ends to which the public revenue can, in any community, national or colonial, be possibly devoted, and that until these ends are decently provided for, no other outlay, however tempting, can legitimately be made ? Now, with reference to those all-important matters, how do we, in this good colony of the Cape, stand just now ? Alas ! Sir, after retrenchment has done its best ; after an economy which may almost be termed hunger-bitten, has been at work ; after we have canvassed the annual estimates in the most critical spirit possible,—squeezing here a little ; clipping a little there,—paring in one place, and rasping in another, and endeavouring to save, as much as in us lies,—what have we been able to accomplish ? What splendid surplus have we succeeded in securing, of which we may set about to argue the most expedient application ? Sir, am I not borne out in saying that all we have been able to shew is, one day a miserable balance of £90 in favour of the Treasury, and the next day an absolute deficiency ? With these facts staring us in the face ; with apparent inability to meet even the ordinary and everyday expenditure of the colony, what on earth can be the use of our affirming a series of speculative resolutions which may, perhaps, enunciate a number of most unquestionable truths, but which do not enunciate, nay, which do not even pretend to enunciate that without which those truths are absolutely meaningless, a practical, detailed, and well considered plan for raising the supplies ? We may no doubt employ our minds upon this as upon any other abstract topic, as an intellectual exercise ; but for any legislative purpose that I can see at present, my hon. friend might as well set us to consider the origin of evil, or the perpetual motion, or the squaring of the circle, or the famous question of the schoolmen, “whether a chimera buzzing in vacuo, could devour second intentions,” as upon this same matter of English labour, considering the state in which it is left by his resolutions and his speech. But I shall concede a little in order to get on. I shall suppose that, by means of the sky falling, or, what is perhaps not much more probable, the revenue rising, or in some other unexpected way, we get our heads

a little above water, and have something over and above the ordinary expenses of the government. I shall suppose that, by a still severer application of the principle of retrenchment than any which has yet been made,—a proceeding which I shall not object to see tried, being, I trust, as willing as my neighbours to submit with resignation to what I may personally be called upon to suffer,—we may taste, as legislators, the sublime delight of having a surplus to dispose of. What, then, shall be done with it? Recollect, Sir, that I am not speaking of funds so ample as to embrace a number of advantageous objects and thus make selection needless; and if such funds be not at your disposal, if you be under the necessity of weighing opposite utilities; if of two admitted good things one only can be taken and the other must be left; if the claims upon you be in conflict, and you can only satisfy one class of those which are preferred,—I say that, looking to experience, to reason, to what has worked well in other places, and to what is likely to work well here,—I come unhesitatingly to the conclusion that the encouragement of public works is the outlay next in order to the supply of those social wants already spoken of, and that, before you devote your means to the furtherance of immigration, your system of internal communication should be rescued from its present wretched state;—for a country without roads to circulate its produce is a body without arteries to circulate its blood. If, as I have said, our means make it impossible for us to accomplish both the opening of our roads and the realizing of extensive schemes of immigration; if it be imperative to choose between the two, I take my stand upon the good hard road at home, and leave my hon. friend to take his foreign flight. Think, I beseech you, Sir, what the effect would be of connecting Cape Town with the colony by a road over the flats; of rendering accessible one of the finest grain districts in the colony, or the world, by opening Mostert's Hoek; of bringing Beaufort and its produce right down to Mossel Bay; of facilitating for the neighbourhood of the Sneeuwberg the means of transport to the sea. But when we have not sixpence to spend on any one of these noble undertakings, and when, for want

of them, the supply of labour that we have is not one-half as productive as it might be ; what on earth, I ask again, is the use of calling on us to affirm a series of speculative resolutions about emigration, and above all, of calling upon us to affirm the monstrous proposition that the colonial revenue should be charged with the expense of such a project ? Sir, with these works remaining to be done ; with no money to do them ; with barely enough of means to carry on the Government ; our controversies respecting what should be done with a surplus revenue, if we had it, are about as idle, as the controversy of the two Jacobins who in England, at the outbreak of the French Revolution, went to loggerheads about which of them, after the confiscation of all aristocratic property, should be the owner of Woburn Abbey. I might stop here ; but having come so far, I am not unwilling to go a little farther. As a practical question, the motion of my hon. friend is met by showing that, instead of having any means for his favourite object, we have no means to effect objects of a much more pressing character. I shall assume, however, that Government is kept going ; that public works are reasonably attended to ; and that we have still some revenue to spare. Postponing immigration to the supply of our social wants ; ranking it second even, as this colony is situated, to public works, I yet willingly admit that whatever means we can command after those two great primary expenses have been borne, is fitly applicable to the cost of introducing labour. My hon. friend, I see, agrees with me in this observation, however much he may differ from some of the other remarks which I have made ; and, in truth, it is a matter upon which there cannot I suppose be any difference of opinion either in this room or out of it. But the question still arises, where is this supply of labour to be sought ? My hon. friend says, unhesitatingly, from Great Britain, and from Great Britain only. His resolutions are all directed to this end, and his speech was an exposition of what he regards as its unspeakable advantages. Here, however, there are two inquiries which may, I think, be rationally made, and which deserve, in my opinion, very grave consideration. Is it clear, in the first place, that the English labourer will suit the colony so

wonderfully? and, in the second place, is it clear that the colony will so wonderfully suit the English labourer? Now, without disparaging at all either the South African colonist or the English workman, I hesitate to yield my assent to the proposition that they are formed to meet, either by nature or habits. I doubt very much, considering the hands in which such capital as is applicable to the support of agricultural labour in this colony is now held, whether English labour would be relished. The question is, not what sort of a labourer my hon. friend would like, but what sort of labourer the Dutch Boer, as he is generally found, will like; and notwithstanding the public meetings in Cape Town and Graham's Town may vote for English labourers, and that no dissentient voice be heard thereat; notwithstanding that, in the course of common conversation, the Boers, in general, speak favourably of the introduction of every sort of labour; yet I have erred egregiously in my own limited investigation, and I am, moreover, egregiously misled by many persons, much more informed upon the subject than I can possibly pretend to be, if in his heart of hearts the genuine Dutch Boer does not look upon English labour with an unfavourable eye. Sir, the common conversation of the colony may take what course may appear to be convenient, but if we could get below the surface, if, for instance, my excellent, and much respected friend, the judge now on circuit, could just send this question about English labour as a collateral issue to every Dutch jury whom he may have occasion to charge, to be decided solemnly upon their oaths, I should be astonished beyond measure if the great majority of verdicts would not be against its introduction altogether, or, at least, until every means of getting workmen had been tried, and tried in vain. Sir, it is idle to call this feeling a prejudice, and to assert that it is the nature of prejudice to disappear, for there are prejudices too deeply implanted to be readily eradicated; and to disregard prejudices upon a question of this kind would, in practice, lead to errors in legislation akin to those which would be induced in machinery, by proceeding upon the abstract principles of Dynamics, and estimating friction and resistance as of no account whatever. The Boer and the

labourers do not speak the same language; their way of working is different; their way of living is different; all their manners and customs are dissimilar. The Boer has some feudal, or rather, perhaps, allodial, notion of his own importance as a landholder, and he does not like to have it intimated to him by a bare-breeched fellow, brought in the other day at government expense, that he is looked upon as an absolute ignominy. The Boer with English labour is like Pistol with Fluellen's leek. It may be forced upon him, but it goes against his stomach. His appetites and his digestions do not agree with it. Now, we must make up our minds to work with the instruments we have. I have not heard it openly advocated, and no man in this Council or this colony, or indeed, in his senses, will ever entertain the notion that we should get rid of these Boers;—that, without, perhaps, setting our English immigrants to exterminate them as the Jews did the Canaanites of old, we should yet buy them out, or worry them out, or in some way or other send them all about their business. Nothing so mischievous and absurd as this is dreamt of, and with our Boers as they now are, and as they are likely to be for some time yet to come, to pour English labour into Dutch farm-houses would be to pour new wine into old bottles with the Scriptural result,—the bottles would be broken, and what would become of the wine? God knows! If the correctness of these views be doubted by any one, I refer him to a journey through the colony, and I am rather disposed to think that had my hon. friend been able to carry out the intention which he had at one time formed, and to have gone the present circuit, he would have seen enough to induce him to modify considerably some of his opinions. Observe, Sir, that I am not denying that there is in this colony a market for labour. That much employment may be given and obtained, I entertain no doubt. My hon. friend at the end of the table (Mr. Field) can set me right if I err in stating that in the course of twelve months he could apprentice out, in the colony at large, not less than 20,000 liberated Africans, in places where they would themselves be very comfortable, and where their masters would be glad to get them——

Mr. Ross :—If they could get them for nothing.

ATTORNEY-GENERAL :—What I have now said, if well founded, shows that there is room for labour ; but, as my hon. friend opposite (Mr. Ross) has just intimated by his interjectional remark, that labour must be cheap,—another sort of labour altogether from that which my hon. friend beside me (Mr. Ebdon) proposes to import. For, if anybody imagines that 20,000 British labourers could be got rid of with the same facility as I have supposed in connexion with the 20,000 liberated Africans, he is, I think, most woefully mistaken, since the Boer, generally speaking, would rather have the African for nothing than the Englishman for nothing ; and since, although the Boer might take the Englishman for nothing, the latter won't work for such wages. And here, Sir, I cannot but advert to the unmeasured terms in which coloured labour has been denounced to-day by my hon. friend. I am by no means prepared, upon this subject, to go as far as he does, nor even to subscribe to the more moderate opinion of the *Commercial Advertiser*,—a print which my honourable friend has justly panegyricized, and of which the articles, which I always read with pleasure, possess, I admit, both soul and body. I conceive that both my hon. friend and the able writer to whom I have alluded have unduly disparaged the aptitude of the African for labour. My hon. friend has described the labourers recently arrived as “savages,” and has indulged in some other epithets equally unsavoury. That the liberated African has no agricultural skill, I allow ; but upon the other hand, how much of the agricultural skill of the English labourer must be absolutely useless here,—for who could attempt to introduce the husbandry of Norfolk into the wilds of Southern Africa ? The one has, indeed, knowledge to acquire, but the other has, what is more difficult, knowledge to unlearn,—and without entering either into physics or metaphysics, or investigating the extent of natural capacity, I do not hesitate to say (misled, it may be, by the fervent sympathy which I have ever entertained for a race harmless and long oppressed) that the African is able to do his work when his employer knows how to set him to his work,—and that the skill and industry, as labourers, of the coloured classes in this

colony exhibit as fair a ratio when compared with the skill and industry of their employers, as is usually presented by the two classes of master and servant in most other places. It may, I consider, be reasonably hoped from the spread of that education which is now going forth throughout the colony, that the rising generation, both of masters and men will go on gradually improving together ; the intelligence of the one will naturally follow the intelligence of the other ; and talk as we may of stupidity and sloth, I do believe that there is enough in the head and in the arm of the coloured labourer (when the master who is to direct him is found to exert his own faculties, and to lay his own shoulders to the wheel), to draw out what I believe do exist in this colony,—the materials of prosperity. I have been thus considering the contrast, of which we hear so much, between the English labourer and the African, and have urged some reasons for questioning whether, in this colony, situated as it is, that contrast is so clearly in favour of the English labourer as some persons imagine. But there is one respect in which the two classes are very strikingly contrasted, and which, were I to omit, I should be justly chargeable with leaving out the part of Hamlet from our drama. Admitting, for the sake of argument, that English labour is an article to the full as excellent as my hon. friend supposes, it must still be admitted that the article is expensive. Will the Englishman work for the wages of the African ? Certainly not. No one thinks of such a thing. Do you hope, then, by all the preaching in the world, to proselytize the Boer to the opinion that he could pay for any labour, however superior, higher wages than he pays at present, and escape destruction ? Do you think you will persuade him that notwithstanding what it costs him for want of roads to carry his produce from home to market, and the small profit which is left when this expense, with other heavy charges, are deducted, he could still afford to pay a first class labourer high wages for inspanning and outspanning, and all that loose and desultory sort of country work of which alone he has any notion, and which alone, in many instances, perhaps his circumstances will permit ? No, no ; believe me that though many Boers will say

that English labour may answer other people, or, at all events that it may answer the colony to bring in men who, if industrious, will rise from the ranks, and thus contribute to augment the public wealth, yet they will all admit that such labour would not answer them; that it is above their price; that they would be ruined by resorting to it; and that, while it is doubtless very good for those who can afford it, they, for their own part, would no more think of discarding their coloured people to have their places supplied by costly English labour, than they would think of discarding their duffle jackets in order to clothe themselves in costly English superfine broadcloth. Thus much in connection with the expense of British labour while actually in the colony. Look now at the expense connected with its original introduction. I rather think that the outlay necessary for such a purpose is for the most part very much underrated. When we consider the machinery required; boards at the other side of the water to collect emigrants; boards at this side of the water to receive them; paid agents in both places, and agents well paid too, to say nothing of the great expenditure in transport, and the cost of subsistence in the colony until such time as the labourers should be suitably provided; it appears to me that upon an average, £12,000 per annum would not suffice to introduce into this colony, annually more than 150 labourers with their wives and families.

MR. EBDEN :—If you said 1,000, I should assent to your proposition.

THE ATTORNEY-GENERAL :—There certainly is an important difference in our calculations. Mine is founded, as I have stated, upon the presence of wives and of families of the usual extent. It may be that the fair sex has its advocates, and that the wives will be considered quite as good as the husbands; and some may be fond of children, and maintain that the offspring are the best of all. But taking into account the various expenses which I have already glanced at, and awaiting from my hon. friend an exposure of my error, I retain, for the present, the opinion which I have expressed, and conceive that £12,000 will not locate throughout this colony a greater number than 150 of English labourers fit for immediate

work, together with their wives and children. Sir, there is another consideration which, in connexion with this argument, seems to me to be deserving of some weight. You have in this colony a labouring population already. That population is, generally speaking, a coloured population. Is there nothing here to raise a doubt as to the expediency of looking to England, instead of Africa, for an addition to that coloured labour? Observe, the question is not between English labour or none; for then the introduction of the former might be a matter of necessity. But the question is, when white labour and coloured labour are both before you, should you supplant the coloured labour which you already have by the importation of labour of an opposite description? I am far from dogmatically asserting that labourers from England, from Germany, and from any part of Europe from which they can be obtained, ought to be unhesitatingly excluded, merely because our present labouring population is of another species; but still I have my fears that the importation of such labour will probably issue in the additional inflation of the white, and in the additional degradation of the black. By the introduction of European labour we run the risk of nourishing a feeling of caste even in the very working class,—of creating an aristocracy, the foulest and most disgusting of all imaginable aristocracies,—the wretched aristocracy of skin. White labour is doubtless the best labour where all the mass of labourers are white. But when, no human legislation can bring this state of things about, it may, I think, be fairly argued that the mixture of coloured people with coloured people may be the most expedient mode of improving your existing labour market; for the new comers cannot possibly look down upon those who are already here, and those who are already here, belonging always to the same race and often to the same tribe with the new comers, never dream of regarding their sable brethren as their inferiors. Now, if there be any weight at all in what I have been throwing out, it appears to me that we ought to pause long, and consider well, before we give to the question—does English labour suit the present circumstances of this colony—an affirmative reply. But let us cast those considerations to the

winds,—let us concede the perfect fitness of English labourers for our service ; and let us next see whether, although they are sure to suit us, we should be likely to suit them ? The contract to be entered into is one which, like matrimony, requires the consent of two parties. Can we, then, look to obtain the English labourer's consent ? I doubt it. By no means blind to the amount of destitution now in England ; well aware of the misery and suffering which prevail not merely in the manufacturing, but in some of the agricultural, districts of that country ; perfectly convinced that there are in England numbers whose condition would be immeasurably bettered by a removal to the Cape, since, in such an event, the appalling spectre of absolute want could dog their steps no more ; I question still whether we can hold out inducements of a character sufficiently influential to attract extensive emigration to these shores. The question is not, whether an Englishman would not be better off here than he is at home. This is admitted. But the question is whether he would be better off here than in other quarters which are assiduously bidding for his services ; and unless, in fact, we draw the long bow ; unless we borrow the aid of imagination, and represent this colony as a land flowing with milk and honey,—a land whose stones are iron and out of whose mountains they may dig brass ; it will be impossible to convince the Englishman that he will not be better off in Canada where land for settlement is readily obtained ; that he will not be better off in the United States, where wages are extremely high ; that he will not be better off in Australia, where both these advantages exist, than he would be in this colony, where settlement is by no means easy, and wages are very moderate indeed. Am I wrong in this ? Suppose my hon. friend were himself to visit England upon an emigration tour (and no man in the colony is so well qualified as my hon. friend to make such a tour effectual), and let us imagine that he is able to collect, somewhere or other, a crowd of the unemployed about him, to whom he proceeds to depict the blessings which await the British labourer in this colony.—“ Come,” he exclaims, “ Come, to the Cape. We want labour there, and will reward it amply. There can be no doubt of this, for a petition,

signed by 1,050 inhabitants, has said it,—a series of resolutions of the Legislative Council moved by me have said it,—and such sayings are not to be gainsaid. You are just the men we want. South Africa waits to welcome you to her teeming bosom, which, cultivated by your labours, is ready to rejoice and blossom like the rose.” “Ah,” they would reply, “this is poetry. Pray postpone that sort of thing, and tell us plainly what we shall get by going there ; deliver yourself like a man of the world.” “The world,” exclaims my hon. friend,

“*A fico* for the world, and worldlings base;—
I speak of Africa, and golden joys !”

But still the question must be answered about the board, and the lodging, and the wages ; and my hon. friend will at length be driven to declare that the English labourer who comes to the Cape will live in a pondok, have as much mutton as he can eat, with a plentiful scarcity of vegetables, and sixpence a day. I speak of sixpence a day, which is about ten dollars a month, because however it may be in towns and in the immediate neighbourhood of towns (from which place, I presume, the civil commissioners have generally taken the data which have found their way into the Blue Book), I believe the average rate of agricultural labour throughout the western districts of the colony is rather under ten dollars a month than over it. Now when a man may be carried from England to Canada for £2 10s., and if he dislike the rather reduced scale of wages there, may cross over into the States, where he is sure of an American dollar a day upon the public works ; when the Australian colonies, with immense means and immense machinery, are moving heaven and earth to obtain emigrants ; and when, so great are the obstacles to emigration, a single year of drought in those regions has such an effect in England as almost to baffle all the efforts which are made,—I doubt whether, without some attempt to deceive and declude the people—(a thing which would be improper if it were possible, and impossible if it were proper), we can rationally hope, in the midst of such colonial competition, to attract much of the notice of the emigrating classes.

Ten rix-dollars a month are not emigration wages. It is to be hoped that we may be able to afford more hereafter ; but until that time shall come, we have, I fear, no help for it but patience ; for we must not do evil that good may come, and by highly wrought description bring people here, who would at once discover any imposition which had been practised upon them, and burthen ourselves with a discontented and repining mass of men, who, if 5,000 of them were landed to-day upon the jetty, would resort, within a week, to either mendicancy or plunder, and form a curse and not a blessing. I see no way in which such emigrants could be kept in anything like temper except by the Government here resorting to something like the old allowance system in England, and making up, though the civil commissioners of the respective districts, the difference between the wages which the Boer can give and the wages which the emigrant will grumble greatly if he does not get. How different, Sir, in these respects, are the circumstances of the liberated Africans ? Few things indeed, have struck me so much, since I came to this colony, as the success which has attended the introduction of these inoffensive people. What the English emigrant would turn from with disdain, are, to them, incalculable blessings. They come here with no exaggerated notions, and, finding all their simple wants supplied, are happy. I fully concur in the sentiment which here and elsewhere your Excellency has more than once expressed, that there is not a colony in Her Majesty's dominions so well suited for the reception of the persons redeemed from bondage as this colony of the Cape ; and feeling that what the English would consider a comparative evil, the African must feel to be a positive good, I am not prepared to say that any scanty pittance, which we may be able to afford for the introduction of labour, could be better employed than in bringing in the class to whom I have alluded. You will here observe, Sir, that the English emigrant whom I have spoken of, is the English emigrant brought here at the public expense, to work as a mere ordinary drudge. Far different will be the situation of the superior English emigrant, employed to act as a bailiff or overseer, whose services are always valuable, and who has good

prospects in this colony. But such an emigrant as I have now supposed does not crave to be carried here for charity. He will either pay his own passage, or he will contract with an employer who will pay it for him, and such persons have come into the colony, and will continue to come into the colony, without your assistance,—drawn hither merely by the fact that they are wanted, and that, being wanted, they will be adequately paid. But as regards persons of the other class, mere day labourers, who are destitute of all pretension to act as superintendents, and who must partake the toil of the common coloured population, or starve,—I am not prepared to regard their introduction with anything like the same complacent feeling. The experience which I lately had of the prospects held out, at this end of the colony, to some English labourers who were wrecked here by the *Prince Rupert*, was not by any means encouraging, and may be referred to in part supply of proof of some of the positions for which I have contended. Hitherto I have spoken chiefly if not altogether of the western districts of the colony. I confess I take a view very different indeed of some portions of the eastern. You will not imagine, Sir, that I am about to draw invidious distinctions, or to deny that the Dutch Boer is a character to the full as estimable as the English settler. But Albany is English ; its language is English ; its habits of acting and thinking are English ; it has some idea of how English labourers expect to live, and of the wages for which English labourers alone will work ; and circumstanced as it is, and as it promises to be, presents a field for the gradual introduction of British labourers which, for my own part, I cannot but look upon as decidedly inviting. But even in Albany the British labourer, if I be not mistaken, is required for agricultural purposes alone. The great staple of that district, the great hope of the colony—the growth of wool, does not demand a supply of English labour ; and would, I believe, be injured by having much of that sort of labour charged upon it. The Fingo and the Mantatee herd as well as the Englishman ; are generally as trustworthy ; and work upon much more reasonable terms. None but a madman, I suppose, would set a band of Englishmen at forty dollars

a month each to tend sheep, which can be very well taken care of by a fellow in a kaross, who serves for a year for a cow or a few goats. Indeed, I question whether there is any colony in the world where the wool trade will bear the expense of English labour. We saw by the evidence of Mr. Lord of New South Wales, which was copied the other day into the *Commercial Advertiser*, that that great wool grower is of opinion that Australian wools will suffer in the English market, in case some labour cheaper than the British is not provided for the sheep; and that the introduction of hill coolies from India (a succedaneum which he had himself tried, and which he strenuously recommends to others), is necessary to save the trade in question from decay, if not destruction. He beseeches his fellow-colonists in Australia to abandon the idea of importing shepherds from England, as they cannot, in the long run, afford to pay them; and duly considering these things, it will be absurd, I think, for us to seek to encourage our Cape wool by resorting, for its management, to a kind of labour which we are under no necessity of employing, and a kind which those who have tried it are anxious to replace even by that which must be brought from a great distance, and which, when introduced, is not superior to that which we have ready to our very hands. But although Albany does not, I imagine, want shepherds from England, it does, I believe, want agricultural labourers; and I should rejoice if a scheme could be devised of giving to this quarter of the colony a gradual supply. Sir, it is probable that my hon. friend will say, in reference to what I have hitherto been stating, that my main and principal objection to his resolutions is connected with the supposed want of means to carry out their object; that, if this great obstacle could be overcome, most of the others which have been adverted to could be readily got over; and that of means we must be held to have abundance. Referring, as he does, to Lord John Russell's instructions to the commissioners, he will bid me look to the principle on which they are based, and speak of want of means no more. Sir, I am not ignorant of that principle. Some ten years ago, or thereabouts, Mr. Edward

Gibbon Wakefield woke one morning, and found that the world had, until that moment, been all in the wrong respecting the true theory of colonization, and the principles upon which prosperity, whether national or colonial, could alone be secured. "Keep up," said he, "the price of your waste lands, so as both to condense the people you have, and to create a fund ; and then, with the fund thus created, bring in more people." Of a theory which has obtained great popularity, and which has proselytized many able and eminent statesmen of all parties, I speak with great respect, and venture to hint objections with the utmost diffidence. But, to tell the truth, I question somewhat the soundness of the Wakefield principle in general ; and, at all events, I am pretty clear that it is a principle quite inapplicable to this colony. How it can be expedient, anywhere, to take from the first settlers in a colony, who seldom are great capitalists, a great portion of whatever capital they have, in order to bring troops of labourers into that colony, it is difficult to discern. By one and the same process you import the labour and export the capital which was to set that labour moving. Raising the price of waste land, you check the tendency to spread ; but that a new country will best develop its resources by confining its population in point of room, or, in other words, by making it as like an old country as possible, may, I conceive, be reasonably doubted. America did not grow great in this way ; nor has Australia thriven thus. Applied with moderation, the system may unquestionably work well ; but there seems in many quarters a tendency to press it much beyond all reasonable limit. Be these things, however, as they may, the Wakefield principle is quite inapplicable to the Cape. You have now no waste lands worth mentioning fit to sell. You are, as a colony, 150 years old. For the whole five millions of acres of debatable land which you alone possess,—I mean land of which it is debatable whether it be fit for settlement or not, you probably could not obtain, if it were put up for sale to-morrow, more than some 12 or 15,000 pounds in all. With this paltry sum, what could be accomplished ? Why, just nothing. No doubt, indeed, if you could open roads ; give free access to the

lands now waste ; make them valuable by connecting them with markets or ports for shipment, you might realize much more. Who for instance, would now purchase from you the Cape Flats ? But if you began a road to Stellenbosch from this, the Cape Town end, and then sold the land on either side, erf by erf, and lot by lot, as you gradually proceeded with the work, a large sum would, in all probability, be ultimately obtained. Is it not, then, putting the cart before the horse ; stifling your hopes of large land revenue ; killing the goose that may hereafter lay the golden eggs, to seek to divert every penny of public revenue which you can scrape together to the one object of introducing English labourers,—English labourers who, when they arrive, find no adequate capital in the hands of Government to give them employment upon public works ; and for want of public works, find no adequate capital in the hands of private persons to afford them those wages which they are entitled to expect ? If we want labour in this colony, we want capital as much ; and neither of these things can, without the other of them, accomplish anything considerable. I believe, indeed, that our colonial capital is increasing. I am not one of those who cry out that the colony is retrograding. The leading article in the *Commercial Advertiser* of this morning shows that such a cry is altogether groundless. We are, I think, going forward ; slowly, I admit, still we are going forward. Under these circumstances I cannot suffer myself to sink in the slough of despond. The solid foundations of colonial prosperity are laid amongst us, and time, I confidently trust, will rear aloft the superstructure. But some one, my hon. friend perhaps, will say that we should strive to move more rapidly. Let this be granted, but how shall we increase our speed ? This, Sir, is a hard question, and in my waking moments, I could not hope to answer it at all. But were I to shut my eyes to everything about me, and indulge in a day-dream, I could imagine sundry very pleasant things. I could imagine that the Secretary of State had sent us word that he had wiped off our paper money debt, and that it, and all its memorials, were consigned for ever to the tomb of all the Capulets,—the commissary's chest.

I could imagine that, having done us this signal service, his lordship, acting upon the well-known maxim that one good turn deserves another, had at once proceeded to bestow on us a second favour, and had granted the two per cent. additional customs duty as an answer to our prayers. When our finances had been thus in some degree recruited, I could imagine that the colonists, anxious to secure those two great objects, public works and immigration, began to clamour (remember I am only dreaming, Sir,) for the imposition of such an additional taxation on their property, as would afford to the treasury a clear and permanent surplus of, let us say, ten thousand pounds a year. I could imagine that, upon the strength of this ten thousand pounds a-year, we borrow two hundred thousand pounds at five per cent.; place £100,000 in the hands of a Board of Public Works; place the other £100,000 in the hands of a Board of Immigration; providing thus two powers which would work reciprocally into each others hands; the Board of Public Works securing employment for the labourers imported, pending their absorption into the general service of the colony, and the Board of Emigration supplying, by their imported labourers, the means of having the public works efficiently accomplished. Under these circumstances all these resources of the colony are called forth, and it starts to run its course rejoicing. But while I am gazing on this delightful vision, if any practical man will give me a thump upon the back, and ask me what I mean, I shall look extremely foolish. Do I think that the Secretary of State will feel himself at liberty to wipe off the paper debt? Sir, I don't think it. Do I think that the two per cent. so long delayed, can now be reasonably hoped for? Sir, I don't think it. Do I think that the colonists, however they may seem, by speech or silence, at our public meetings, to have their hearts fixed on the objects which have been described, will tolerate a tax in order to carry out these noble projects? Sir, I don't think it. Speaking costs little; silence costs less; but taxation (to which after all both roads and emigration must at last come round), would cost much more than either the speakers or the auditors would, for an instant, think of giving.

My dream is now told ; destined, I fear, like other dreams, to go by contraries ; but visionary as it is, it may be that if the fates were favourable and we only possessed the necessary go and spirit, there might, after all, be something in it. At all events, I am sure it involves a plan more practical in its nature than any which my hon. friend has this day propounded. For my hon. friend, Sir, as I before remarked, has propounded no plan whatever. He tantalizes me by describing a good which he does not teach me how I am to attain. He places me on Pisgah, but it is only to behold what I seem destined not to enjoy.

The wide, th' unbounded prospect lies before me,
But shadows, clouds, and darkness rest upon it.

Upon the whole, then, I can see no use whatever in affirming any resolutions relative to Immigration ; for what is so childish as to be announcing propositions, and then doing nothing towards their realization ? I have, as was my duty, spoken my mind freely upon this important subject. But I am misunderstood if I am supposed to look upon the colony as an ungrateful field for capital and industry. The nature of the discussion in which I have been engaged has naturally led me to advert to the unfavourable, rather than to the favourable side of our affairs. But I believe that this colony has many capabilities well deserving of being worked ; that it may become rich in wool and rich in agriculture ; and that it is even now travelling onward to comparative success. I question if there be in any other colony a better place than this for the industrious man of moderate capital. Come here with a thousand pounds or even half of it ; make up your mind to rough it a little for a time ; and although the Boer is slow to sell his farm, he will give you the run of as many sheep as you think proper for a very trifle, and you can scarcely fail of being rewarded with reasonable success. Such things will prove the germs of our colonial prosperity, and a gradual growth is even now going on. The Cape is not one of those speculative colonies, at the pinnacle of prosperity to-day and in the depth of despondency to-morrow ; kept up by the influx of successive capi-

talists, and incapable of standing self-supported and alone. Our state, I believe, is sound and healthy. We must not endanger that state by attempting to achieve impossibilities; nor has your Excellency the power, even if you had the inclination, to *Gawlerize* this colony by a lavish but unauthorized expenditure. I have, in conclusion, only to add, that if, our urgent wants being satisfied, we had still the means to try the great experiment of English immigration, I should recommend and not oppose the trial. But being, as we are, totally without such means, my counsel is, to obtain as much of a cheaper sort of labour as we can, and wait for better times.

AT THE ANNUAL MEETING, SOUTH AFRICAN PUBLIC LIBRARY.

[April 30, 1842.]

After the delivery of the usual annual address, a vote of thanks to the committee was passed, and the Hon. W. PORTER, being called upon to reply on behalf of the committee, rose and said:—

Our excellent chairman has just asked me, whether or not I have a word to say on the part of the committee. I had not expected to be called upon in this way, because my worthy friend opposite (Mr. Stein) who is particularly named in the resolution, in his capacity as treasurer, happens to be, as we all know, a committee man as well, and therefore it might fairly have been concluded that the duty of acknowledging the compliment conferred, would have devolved upon his shoulders. But as my good friend—with a modesty which I am happy to recognize in any Scotchman—cannot be prevailed upon to rise, I shall proceed to offer a few remarks, and a very few they shall be, in connection with our meeting here to-day. Sir, I conceive, for my own part, and I have no doubt whatever that I speak the universal sentiment of all present, when I say, that our anniversary assemblies in this room are not so much intended to allow us to hear certain accounts

read, or to ascertain the honesty or accuracy of those to whom we entrust the management of our pecuniary interests, since we may be perfectly assured that everything will be correctly done without our auditing. But one great and leading end of our assembling surely is, that we may have an opportunity, from time to time, of hearing such discourses as that with which all of us to-day have been so visibly delighted,—discourses which no one can hear, understand, and treasure up, without going home a wiser and a better man. I feel that I shall have the approval of every lady and of every gentlemen who hears me, when I state that the subscribers to this Library, and the public in general, are much indebted to my reverend friend, Dr. Adamson, for what he has said to us to-day ; and if there ever were a time during which, for any reason whatsoever, that zeal for the noble cause of literature and science, which at all times distinguishes our chairman, was turned into other channels, and was withheld from actively assisting this institution, I the more rejoice to see that those reasons operate no longer, and that he is here filling a position which, perhaps, no man in this colony is so well fitted to adorn, and instructing the public mind in those high, and I will venture to term them, holy things which belong to intellectual culture. Were I able I should willingly say something to increase the impression which our chairman has produced. But I am not able ; and this reminds me of an anecdote relative to Burke, with which you are all probably familiar. When the great orator first stood for Bristol,—the candidate who stood with him on the same interest was a mercantile man, one more familiar with figures of arithmetic than with figures of speech. When Burke had terminated that magnificent display, which still remains on record as one of the happiest efforts of his genius, and his fellow candidate was called forward to address the electors, he simply said, “Gentlemen, you have all heard what Mr. Burke has said, and to everything Mr. Burke has said, I say ditto.” Now, situated as I am, I doubt whether the best thing I could do would not be to adopt the language of the Bristol man, and say, “Gentlemen, you have all heard Dr. Adamson, and to all Dr. Adamson has said, I say ditto.” But, Sir, I will

venture to trespass a moment longer upon the patience of the meeting, while I advert to one or two topics, so fruitful of new thought, which you have brought before us. If I pass over in silence any one of those topics, it is not because it was unmarked ; but it seemed to me that the second to which you have adverted was particularly gratifying and important. You have spoken of the effect which a common interest taken in this Library must naturally have in creating and preserving in our local community a spirit of harmony and union. That it must have a tendency to produce this effect is obvious, and it exemplifies the propriety of that great rule of life and practice, that men who differ upon certain points should, if possible, cordially unite in some good points where they agree ; for the result is, that they are knit together by their co-operation where they are agreed, and that asperities are removed from the points on which they differ. Disagreeing, as many of us may do, amongst each other, I yet rejoice to believe that in all Cape Town and its neighbourhood there is no disagreement about this Library ; that we all consider it an honour to the colony ; that we all are zealous for its increased prosperity ; and that we all consider it an object which should excite the interest of every man who has a head to think and a heart to feel. Elsewhere, perhaps, we may not be able to avoid some little—what shall I call them?—not bickerings, only friendly argumentations,—but here no discord enters, and we only meet to try how best we may unite to carry a great and good work out to its perfection. I have, I think, heard Sir George Napier speak of a battle in the Peninsula, which he was present at himself,—and though I now forget the name of it, some of my military friends present will probably remember it,—in which, at a particular crisis of the engagement, each of the previously contending parties, as if by common consent, ceased firing,—French and English both went down in peace to a little river which ran between their lines,—and the men who just before had been in deadly conflict drank in amity out of the cooling stream. In the same way, sir, it is always, I think, a pleasant sight to see men, who face each other in the ranks of civil contest, forget, for a

time, all their hostilities, and drink together of that pure stream of literature which here flows for their indiscriminate refreshment. Sir, pursuing these desultory remarks, I would observe that the way in which you described the feelings which must rise in every reflecting mind, on entering such a Library as this, was surely very just and true. It is, indeed, a great thing to have, in the strong expression of Bonaparte which you adopted, five and twenty centuries looking down upon you from these shelves. Except some specimens in the British Museum, I have not, any more than you, sir, seen anything of those ancient monuments and tablets which Egypt has inherited from an antiquity immersed in darkness. But the reference which you made to them has brought to my mind a striking passage from Sir Thomas Browne. He represents the traveller as wandering amazedly amongst the Pyramids, whilst Oblivion reclines upon them as if upon her throne, and when interrogated by the stranger as to who built those wondrous works, and what their purpose,—“She mumbleth something, but what she saith, he heareth not.” How strikingly do these gigantic monuments evince the nothingness of man’s merely material labours. There, indeed, they stand. But the names of their authors have perished. They furnish no record. They are vanity altogether. But who knows not that the frail papyrus of the neighbouring Nile, enriched by having inscribed upon it the thoughts of the immortal mind, continues to tell its story from age to age, although the mighty Pyramids have long been dumb. Sir, I have been led further than I had anticipated. I conclude by thanking the meeting for the honour which they have conferred upon the committee; by thanking you, Sir, for the good service which you have done this day to the Cape Town public and to this Library, and by expressing my trust that the support which has heretofore sustained this institution will not hereafter be withheld; that instead of languishing for want of proper aid, it will have infused into it fresh vigour, and that it will go on from strength to strength, and from light to light, shining—as the nature of all light is to shine—more and more, unto the perfect day.

ON IMMIGRATION.

[*Legislative Council, March 23, 1842.*]

The ATTORNEY-GENERAL said :—I am unwilling to allow this proposal to spend £20,000 on European Immigration to be put to the vote, without offering some remarks upon it, and I could wish that the forms of the Council were such as to require the giving of some previous notice when resolutions of this important nature are intended to be moved. My hon. friend will not imagine that I am blaming him for following a general practice, or that I impute to him the smallest intention to take any person by surprise. But still it is inconvenient that one should be called upon to advance, upon the moment, to the discussion of extensive and, it may be, rather difficult questions ; and, since forewarned is forearmed, I would always like to have a little time for deliberation. One comfort, however, clearly is, that this resolution connects itself with a number of topics which we have had served up in this Council on so many different occasions and in so many different ways ; which we have first considered, and then set to to consider over again ;—that it may be safely prophesied that none of us will ever forget them till our dying day. My hon. and learned friend, with a proper regard for his auditory, has not travelled much into those matters ; and I shall, upon this occasion, strive to imitate his prudence. With reference to one most material point, I shall only say that I have been much misunderstood if I am considered to have expressed any hostility, either in this Council or out of it, to a fair and reasonable trial of European Immigration. The nature of my somewhat lengthy observations, made upon a late occasion, led me to examine the respective claims of colonial roads and English labour, as competitors for our lamentably small resources ; and in giving my reasons for regarding roads as the more pressing exigency of the two, I was necessarily led to examine

the positions upon which the advocacy of an adverse principle was based. The wretched condition of our revenue led me farther to argue, that neither with regard to roads nor immigration could we rationally hope to effect anything of a practically important character, or do more than affirm an abstract principle. In the advocacy of these views, it was necessary for me to show distinctly why I differed from those who would postpone public works to immigration, and why I argued with those who, if there must be a choice, would postpone immigration to public works. Pursuing such an argument, I was naturally led to subject the declamatory allegations in favour of the paramount advantages of immigration to a somewhat stricter investigation than that to which they are generally submitted; and to shew, by contrast, the superior claims possessed by public works, as connected with colonial outlay. But I never said that if we happily possessed a surplus revenue,—if, after consulting the ordinary necessities of government, we yet had sums to spend,—and if, after some attention had been paid to the improvement of our means of internal communication, we still had got some revenue to spare,—I never, I repeat, said that the experiment of introducing English labour would not be a fair experiment to try, or that it would not be fit and proper to bring in whatever number of immigrants might in the first instance be deemed advisable, reserving to ourselves the right of pausing in our course, should we find that the thing did not succeed. Upon principle, therefore, I am not opposed to the motion of my hon. and learned friend. I may have doubts, indeed, whether you could not apply better the £20,000 in question. I may have doubts, moreover, whether so very small a sum as £20,000, could accomplish anything of consequence in the way of immigration. But, as I have said, with the general principle of the resolution I am not at war. To this resolution, however, my hon. friend, the Acting Secretary to Government, has made two objections, both of them, in my humble judgment, being sound and valid. One of these objections is matter of form, and the other of them matter of substance. The matter of form arises from the irregularity of carrying a money vote which is not submitted to the Council by the Executive Govern-

ment ; and the matter of substance is the uselessness, impropriety, and impolicy of carrying a money vote opposed to the express directions of the Secretary of State. When, on a former occasion, the matter of form, as I have termed it, came incidentally before this Council, I abstained, I remember, from giving an opinion upon it ; but, since then, I have bestowed some reflection on it, and I have come to the conclusion which I have just expressed. It appears to me that the Secretary of State, in making the strong remarks which he did respecting the case of Col. Smith, was well warranted by the principles of colonial legislation, and was not without the support of an analogy arising out of the rules and customs of the House of Commons. I am not disposed unduly to limit the powers and privileges of this Council. Let these be as broad as you can reasonably extend them. But, broad as they may be, it will scarcely be contended that they are constitutionally wider than those of the "awful Commons of Great Britain." Now in a book of great authority on these matters, "Dwarris on Statutes," which I happen to possess, and which my hon. and learned friend has had for some days for another purpose, it is laid down, if I remember rightly, that, whatever may be, in an abstract point or view, the inherent power of the House, yet that a rule of long standing and of inflexible application requires that all money votes should originate with ministers. It is, I believe, considered to be a fatal objection to such a vote, that it is not submitted by the Crown. Those who are the responsible administrators of the revenue are presumed to know what money they require ; and the House will not grant money which they, the administrators, do not deem necessary for the public service. But quitting the point of form (which there might readily be found a formal way of getting out of) there comes the other matter, the matter of substance. Consider what you have already done with regard to the devotion of revenue to colonial purposes, and what Her Majesty's Government has said, in connection with your doings. Surely, as long as the Secretary of State is compelled to tell you that no public works can be commenced in this colony, until what he considers to be an honest colonial debt (he may be wrong

in so considering it,—I wish he could hear my hon. friend opposite (Mr. Ross) upon that subject, but, unhappily he cannot—until, I say, what he considers an honest colonial debt,—I mean the paper money,—be wiped off, it is clear that we cannot make a grant like that required by my hon. and learned friend, without acting in direct opposition to the injunctions we have received. This is a vote of money to pay the interest of an intended debt; the Secretary of State has repeatedly directed that no fresh debt or new disbursement shall be allowed, pending the destruction of the paper money; and, under these circumstances, I cannot see how any official member of Council can support a resolution directly contravening the reiterated directions of Her Majesty's Government. How, then, can this resolution receive your Excellency's sanction? and how, even if sustained by the unanimous concurrence of the unofficial members, can it possibly be productive of any practical result? It is to be observed, however, that the resolution, although negatived, will yet appear upon our minutes, and thus, perhaps, achieve the principal object which its supporters have in view; but it might, after all, be worth consideration whether some resolution might not be framed, which might command more general approbation than can be challenged by the present,—say, for instance, a resolution beseeching the Secretary of State to give a favourable consideration to the subject now in view. Whether, indeed, such a resolution could have any effect upon the mind of the Secretary of State, considering —

SECRETARY TO GOVERNMENT :—That, in fact, was the substance of Col. Bell's resolution.

ATTORNEY-GENERAL :—My hon. friend is quite correct. We have already appealed to the Home Government, and they have not felt themselves at liberty to accede to our requests. That there remains any reasonable room to hope, it would be difficult to assert. The change in the Colonial Office is not likely to work any change in a determination long formed and constantly declared. But your Excellency will, of course, when transmitting the minutes, apprise Lord Stanley of the line of conduct which you have pursued, and

of the reasons by which you were impelled, leaving it to his Lordship to adopt such measures as he may be able to devise for reconciling an expenditure for public works and immigration in this colony with the ultimate liquidation of our unhappy paper debt.

At another stage of the same debate the ATTORNEY-GENERAL said:—Your Excellency and the Council will, I am sure, agree with me that it is right and fitting that questions of a grave nature, involving as well the privileges of this Council as the wants of the Colony, should receive not merely a full, but, at the same time, a calm consideration. If we once allow ourselves to be so nettled by any of the incidents of debate as to lose our tempers, we may be quite certain that, as well upon one side as the other, we shall insensibly allow a species of party spirit to begin to operate; and when that feeling is once permitted to enter, deliberate discussion is completely at an end. Desiring then to address this Council as if it were a jury, packed neither by plaintiff nor defendant, but bound to do impartial justice, I wish to see how we stand with regard to the resolution of my hon. and learned friend, taken in connexion with the despatch of the Secretary of State. To begin with the beginning, then, I shall add a word or two upon what I have already designated the point of form, by which I mean the regularity of a money vote moved, not by the Governor, but by some ordinary member of the Council. Upon this subject I have already intimated my opinion that it is more constitutional, more consonant with the usages of Parliament, and more agreeable to the reason of the thing, that money votes should originate with, and be submitted to, this Council by the responsible Government of the Colony. For this opinion I have already given my reasons. Those reasons are not the terms of the despatch of the Secretary of State. Reading that despatch not as a lawyer (for I do not concur with my hon. and learned friend in thinking this a legal question), but, as far as I am qualified so to do, as a man of common sense, I cannot maintain that his Lordship, in that despatch, asserts distinctly any general rule, or does more than express a particular prohibition. He does not say that no money vote whatever should originate except by your Excellency, but only

declares that money votes for the remuneration of services must so originate. The subject of that despatch was a vote moved by an unofficial member in consideration of services real or supposed ; and in declaring that sort of vote to be irregular, the Secretary of State does not necessarily set his face against all money votes whatever proceeding from the same quarter, for *non constat* but there may be applications of public money other than in the way of rewarding services, which his Lordship might consider this Council competent to introduce. Upon the construction of the despatch in question, I therefore differ from my hon. friend (the acting Secretary to Government) and agree with my hon. and learned friend. But while I thus declare that I do not read this document as laying down, in terms, a general rule, I am at the same time prepared to contend that it affords an analogy strongly corroborative of the reasoning which goes to show that such a general rule exists. It only says, indeed, that services of individuals, until recommended for reward by the Governor, should not be rewarded by this Council. But will any reasonable man undertake to point out any good reason for restraining this Council from votes of money for rewarding services, which will not be a reason equally good for restraining this Council from votes of money for any other object ? It will not be argued that the rewarding of public services is not a legitimate application of a portion of the public revenue. We all know that it is ; and the Secretary of State, by merely objecting to the form in which the thing was done, clearly implies that there was another form in which it could have been done properly. But I go farther, and I say that if there be one application of the public money which the Council generally might be considered as peculiarly qualified to make, it would be an application of the public money to reward services which, having been rendered to the public, this Council has the best opportunity of estimating. It is curious that my hon. and learned friend (Mr. Cloete) in arguing upon the usage of the House of Commons, has instanced this very case of public services to be rewarded, as affording obviously the strongest grounds for maintaining the expediency of passing money votes not originating from the Crown. Now

here in your stronghold,—upon the very question where you think, and properly, that the advantage of such a right as you contend for is most obvious,—the Secretary of State has expressly and admittedly decided against the right. Under these circumstances, I leave it to this Council to determine whether his Lordship's despatch, although in its terms it does not affirm a general rule, does not afford good reason for inferring that, in his opinion, such a rule obtains. Conceding, therefore, to my hon. and learned friend, that he has demonstrated that the Secretary of State speaks only of one given class of money votes, I call upon him to shew the grounds for his conclusion that certain other classes of money votes, passed in the same manner, might consistently meet his Lordship's approbation. We now come again to the usage of the House of Commons. I am glad that the general accuracy of my recollection, as far as the passage in Dwarries is concerned, is confirmed by my hon. and learned friend. That author, in fact, neither affirms nor denies the strict right (a question which it would be idle to contend about, for upon such a subject what is right considered separate from settled usage?) but he does, I think, speak of an invariable practice. Probably since the accession of the House of Hanover no contravention of that practice has taken place. The House, even supposing it to possess such an inherent power, has deemed it right to impose a restraint. The representatives of the people do not go to St. Stephen's to spend the people's money, but to save the people's money; not to open the public purse, but to draw the strings of it as tightly as they can. Every school-boy in England knows that the blessings of representation are, not that members generally may vote any money for this purpose or for that,—or prompt the Executive to fresh expenditure,—but to keep in check the Government, which the constitution regards as quite ready enough to spend freely, particularly on themselves, and thus to secure a due economy. My hon. friend beside me (Mr. Ebdon) has instanced Prince Albert's Pension. Now this is a case in point for me. Ministers proposed a vote of £50,000; Col. Sibthorpe (I think it was) moved,

as an amendment, a vote of £20,000 ; and the then Opposition carried the amendment. This was paring down and not swelling up ; diminishing and not adding ; and thus it comes quite within my principle. My hon. friend, however, seems to consider that the power of subtraction necessarily implies the power of addition ; but this, though true of arithmetic, will not hold, I think, in politics. My hon. and learned friend (Mr. Cloete) has spoken of cases in which, deferring to the wishes of the House, the Ministry have augmented some intended grants to meritorious public servants. There may have been such cases. But those cases are not to the point in dispute ; for the moment the Minister gives way the difficulty is, at once, removed. I can very well conceive an Opposition member taunting the Chancellor of the Exchequer with the inadequate reward which he proposes for some brilliant services. I can conceive him as expressing his astonishment at the new-born economy of the right hon. gentlemen opposite, who was always profuse where economy would be proper, and always parsimonious where liberality was demanded,—and his disgust at the miserable vote, so unworthy of this great country (as they always call England in her own House of Commons) with which Ministers proposed to recompense such services as had been rendered by A. B. I can conceive all this, and a great deal more than this ; and I can conceive the Chancellor of the Exchequer giving way, and adding o his vote. But if the Chancellor of the Exchequer will not give way ; if he remain obstinate, and say that he has neither the means nor the inclination to increase the vote, I can conceive no course for the House to pursue except to address the Queen,—a measure which no Minister in his senses would, under such circumstances, drive them to the necessity of adopting. And see the obvious and intelligible principle on which the rule in question rests. The Ministry, for the time being know what money there is, and what they have to do with it. It is for them to make the two ends meet, and hard enough they sometimes find it to bring the two together ; and good God, are people who have comparatively no means of knowledge, and who, above all, have no responsibility ; are such people, I say, to purchase popularity by voting so much money for this purpose

and for that,—regardless, it may be, of the confusion and embarrassment to which such a course may lead ? I need not pause to apply these remarks to the circumstances of this Council, or to argue, at any length, that this Council ought not to arrogate the power of voting money not asked for by the Executive Government. This Council may urge the Executive to propose such and such a vote, and they may, if the Executive refuse, address Her Majesty, praying her to order the Executive to propose such and such a vote ; but to pass that vote directly, I consider to be unconstitutional and inexpedient. Col. Smith's case occurred before my arrival in this colony, and I am not aware as to how, exactly, the vote in his favour was proposed and carried. But I remember to have seen my friend, Col. Bell, on more than one occasion, when some addition to the estimates was suggested from the other side of the table, take first a pinch of snuff, and then his pen, and make the alteration asked for. In actual practice the matter which we have been discussing may not be of any vast importance ; for, if the official members can outvote the unofficial, it is of very little consequence whether the motion is lost by reason of its being irregularly introduced, or because it is considered to be inexpedient in itself. If, on the other hand, the unofficial members can out-vote the official, then the former can, by rejecting your Excellency's estimate, place themselves in a position, according to Lord Ripon's despatch, to form a new estimate of their own ; and in this estimate they may, of course, include whatever grants of money they think proper. Thus, you see, those who do not like our cookery are at liberty to dress a dish themselves, and the point is, which shall best please the palate of the Secretary of State. It may be asked whether, in case the Council shall reject your Excellency's estimate, and form an estimate of its own, your Excellency would be called upon, pending the decision of the Secretary of State upon the rival claims, to act upon your own estimate which had been rejected, or upon the Council's estimate which had been carried. This is a contingency which might occur, but it is one not contemplated by Lord Ripon's despatch ; for in that despatch it is assumed that the annual estimates are to leave the colony at

such a time as will allow the sentiments of the Secretary of State to be communicated before it can be necessary to act upon either of the two estimates transmitted. When the case arises, it will be time enough to discuss more fully the line of conduct which ought to be pursued, in case the estimates should be so long delayed in this colony, or so long deposited in some pigeon-hole in Downing-street, that the attention of the Secretary of State could not be directed to the conflicting propositions early enough to avert the necessity of acting upon one of them in ignorance of his decision. I have now discussed, as well as I am able, the matter of form. If it be said that I have succeeded in shewing that the matter is not one of a very momentous character, I shall the more rejoice. I am always glad to be able to smooth differences, and much better pleased to promote union than division. If, after all, we must still remain opposed, I shall rest satisfied with having, I hope, given a reason for the faith that is in me. Dismissing now the matter of form, I come to the more important part of the resolution of my hon. and learned friend,—the matter of substance, as we have called it for distinction's sake. My hon. and learned friend has explained, very properly and very well, that there is an anxiety now prevalent to get something done in the way of immigration ; that a disposition to promote that object is looked for at the hands of the Government and of this Council ; and, that any movement in that direction, however intrinsically inefficient, would be hailed as a considerable advance. Of this position of my hon. friend there can be no doubt. Now, although some persons suppose from the tenor of some former remarks of mine upon this wayward subject of immigration (remarks for which I have been considerably abused, though mainly at the other end of the colony, which my vanity accounts for by the reflection that there I am least known), that I am hostile to all attempts to introduce European labour, I beg leave to repeat what I have already stated, that I am no such thing ;—and I should feel myself unworthy to take even my humble part in our small colonial politics if I permitted myself to be moved by those attacks which every one must by turns experience, wherever there is

a free press, or to be provoked, even by injustice, to set my shoulder against any project which deserves to be supported. Quite prepared, therefore, to enter into the feelings which animate the members opposite; ready to make, if I can, what I do not deny to be a rational experiment, only convince me that I can properly and usefully support this resolution, and that support will not be withheld. But I doubt this; and I will tell you why. My hon. and learned friend has admitted and deplored the unhappy position in which we are placed by the injunctions laid upon us to apply every penny of surplus revenue in the reduction of our paper debt. My hon. and learned friend has said that if he had known that he was to be called upon to interpret the directions of the Secretary of State so strictly as not to be at liberty to pass such a vote as the present, in favour of immigration, he would, in his turn, have acted strictly upon this strict interpretation, and voted against every item contained in the supplementary list. Undoubtedly he might have done so; and other members might have followed his example. But that the interest of the colony would have been promoted by adopting such a course, I question very much. It would, I admit, have conveyed his sentiments to the Secretary of State in a very striking shape. To the furtherance of this object, however, my hon. and learned friend would have sacrificed much substantial good, and worked some inevitable injustice. My hon. and learned friend, consulting (as I will do him the justice to say I think he always does), for the public good, can scarcely shew the expediency of refusing grants which he conscientiously considers to be required, merely for the ulterior object of coercing Her Majesty's Government to rescind an obnoxious resolution. But my hon. and learned friend is not yet too late. He still has an accepted time. It is competent for the Council, notwithstanding the progress which has been already made in the discussion of these estimates, to reject them altogether, and then propose new ones. In the latter it will, of course, be competent to add and omit, as the framers may think proper,—to insert a grant for immigration, and leave out the supplemental list. Whether such a course

could be wisely adopted, considering the circumstances of this Council and of the colony, I submit to the judgment of my unofficial friends. I beseech them to look about and see exactly how we stand. I abandon now the matter of form altogether, and confine myself to the substantial merits of the resolution now before us. Do we forget our discussions on the paper money debt? Sir, we never can forget them; and, under these circumstances, my hon. and learned friend will remember that he himself proposed that a sum of £5,000 should annually be placed upon the estimates, and be applied to the gradual liquidation and ultimate extinction of the paper money debt. —

Mr. Ross :—The sum proposed was £6,000 per annum.

ATTORNEY-GENERAL :—Well, I find I was £1,000 below the mark. My hon. and learned friend, making the best bargain which he conceived to be in his power, was prepared to stipulate, with all that solemnity which the subject matter of the contract, and the character of the high contracting parties, might demand, that the sum of £6,000 should annually form the first and foremost item of our estimates, and be applied, no matter what other objects might be unprovided for, to the sacred end of fulfilling our engagement. This proposal has gone home, accompanied by other projects of which it is here enough to say that, whatever may be their respective merits, they are not, and do not profess to be more economical than that of my hon. and learned friend; but, on the contrary, less so; and his plan, if practicable, will certainly cost the colony less than either the plan of Government, or that of my hon. friend (Mr. Ebdon). The Secretary of State may say, I will have nothing to do with any of your plans, and reiterate the old commandment to destroy and spare not. He may take the Government plan or that of my hon. friend (Mr. Ebdon); but these will be more expensive. Under these circumstances, if his Lordship shall declare “Mr. Henry Cloete is a very honest man, and I will take his word for the £6,000 per year,” it is clear that the result will be more favourable to our finances than any other which we can rationally look for. Now your deficiency upon the year being £1,500,

becomes, the moment the Secretary of State closes with the proposal of my hon. and learned friend, £7500.

MR. CLOETE :—What, with £40,000 in the chest ?

ATTORNEY-GENERAL :—Wait a little ; I have not yet closed accounts. Remember the £7,000 laid out in bringing the liberated Africans from St. Helena. If the Secretary of State shall approve of this disbursement, then is so much more money gone its way, and will return no more. No doubt this money is guaranteed ; and there are some very substantial and solvent names attached to the guarantee which has been given. Hostile as he is to the introduction of this sort of labour as an inferior article, my hon. friend beside me (Mr. Ebdon) will probably consider that the Secretary of State would do well to disallow the outlay, and leave those to pay for the whistle who like its music. His own true British Birmingham ware may, in his estimation, suit the colony much better. Should the Secretary of State take a similar view, my hon. friend opposite (Mr. Ross) can hope for little sympathy from my hon. friend who sits so cheerfully beside me (Mr. Ebdon), but, if disappointed in that quarter, he has only to lodge his sorrows in my bosom, where he will be sure to meet all that sincerity of condolence which will naturally spring from the consideration that I shall myself be £50 the poorer. Now, I ask you, is it not better, ignorant as we are of the views of the Secretary of State,—knowing nothing of what is to be done about the reduction of the paper debt,—and nothing of what is to be the result of the expense incurred for the St. Helena Negroes,—to await some communication from his Lordship upon these important points before proceeding to apply your present means ? If his Lordship find us proceeding blindly to vote this money,—in inevitable ignorance as to the real nature of our position and the extent to which we may proceed,—granting, it may be, too little in one state of circumstances, and in another state of circumstances granting too much,—will it tend to heighten his opinion of our prudence and circumspection, or induce him to repose a greater degree of confidence in us than he does at present,—a degree of confidence which my hon. friend opposite considers is not so great

as to be very complimentary? For these reasons, I consider this resolution to be impolitic. In form and in substance I am disposed to meet it with a negative. But I am no enemy to immigration; and only desire to see a rational way of giving it a fair trial. In the estimate of its claims, as compared with those of public works, I remain of the same opinion as I was. I will not, in obedience to any pressure from without, abandon one position which I have taken up. I have nothing to retract, or to qualify, or even to explain. What I said was not delivered without previous inquiry, and I have, since I spoke at length upon the subject, made some further inquiries about wages, of which I shall state the results in due season. But I am not to be driven by that free discussion which my observations have called forth farther than I intend to go. I am not against, but strongly in favour of, trying the experiment of European labour, if you had the means to try it. That experiment might be gradual, and even if it failed, it would, at worst, be but some money lost. Your only obstacle is the want of funds. Remove that difficulty, and you may throw my declamation to the winds. But I hope I have said enough to convince every unprejudiced man that this resolution cannot be passed with any propriety or practical advantage, and that the Council is called upon to meet it with a negative.

ON IMMIGRATION.

[*Legislative Council, May 24, 1842.*]

ATTORNEY-GENERAL :—Although it has so happened, Sir, that I was up until an early hour this morning, I have to admit what certainly is not, under the circumstances, a matter of regret, that I did not employ my vigils in considering this important question.*

* Her Majesty's birthday had been celebrated at Government-house on the day preceding.

My remarks will, therefore, in all probability, be of a more desultory character than they might otherwise have assumed. Let us endeavour, by the way of a commencement, to ascertain the true position of the question now before this Council. During our two days' discussions we have had so many matters introduced ; have had, to speak in nautical phraseology, so many eddyings of argument, and contrary currents of remark and reasoning, that it is by no means easy to say to what point, exactly, the debate has drifted ; and we shall, therefore, do well, by heaving the log and taking an observation, to fix particularly the place in which we now are. From time to time we have had matters of form connected with the legitimate mode of passing money votes, and then, from time to time, we have had matters of substance connected with immigration, roads, and paper money ; and while some honourable members have run off upon one of these points, some have pursued another in quite a different direction, so that to collect the scattered flock together, would require a shepherd of much more skill than I have any pretensions to possess. But while any given quantity of observation may be emitted upon any single one of the topics stated, the practical question which this Council is to consider and determine, is not, perhaps, attended with much difficulty. Let us see, by a short historical retrospect, what the position of this Council with regard to its disposing power over the public revenue actually is. It has been mentioned to-day, but was well known to all of us long ago, that not long after your arrival in this colony, my friend, Col. Bell, drew up and laid before your Excellency a memorandum relative to our paper debt, to our public works, and the great importance of inducing Her Majesty's Government to allow a certain portion of the paper money to remain uncanceled in order that our public works should be promoted by the re-issue of that amount. The memorandum of which I speak was dictated by that lively interest in our colonial welfare by which Col. Bell was ever actuated, and while its arguments and details were very full and very able, its tone, considering that the writer knew himself to be a stipendiary officer of Government, was creditable to him for its strength. He prayed the Secretary of State to give to the

doomed paper money a longer day than had been determined. Your Excellency did not hesitate to transmit and to support the memorandum of Col. Bell, or to solicit the Secretary of State to make such arrangements connected with the time and terms of the extinction of the paper money debt as might allow some important public works, for want of which the colony was languishing, to be undertaken. To your dispatch annexing Col. Bell's memorandum, an answer was received of which a part has been read to-day in Council. That answer is, I suppose, sufficiently distinct. It is idle to quarrel with its purport. While it was different from what some seemed to have hoped for, one thing, at least, was clear respecting it. It was not made *ex parte*, inconsiderately, or without the fullest knowledge of the subject. Her Majesty's Government, having before them as strong a statement of the case as could possibly be framed, deliberated upon it, and finally decided that none of the points relied on in arrest of judgment were sufficient, and that the law must take its course. But the matter did not rest here. Not deterred, even by the tenor of the Secretary of State's reply to the memorandum of Col. Bell, it was determined to try whether a minute of the Executive Council, and a set of resolutions to be passed by this body, might not still have their effect. The two Councils then made a strong and an united appeal——

Mr. EBDEN :—Not all of us.

ATTORNEY-GENERAL :—With one eminent exception, this Council, as well official as unofficial, did unite in praying the Home Government to allow the public works of this colony to be attended to in the only way in which it was possible to consult them. Balancing advantages against disadvantages, a majority of this Council deemed that to improve our roads and bridges was a pressing want, and that it would be well to postpone to this object, the ultimate extinction of the paper money debt ; while, on the contrary, it appeared to my hon. friend (Mr. Ebden) that the extinction of the paper money debt was the first and foremost good to be accomplished, and that until that matter were effected, our roads and bridges must remain in *statu quo*. My hon. friend

would slay and spare not ; devote every surplus penny in the Treasury to the withdrawal of the paper ; borrow money on debentures so as to be in a condition to destroy the residue, and thus make an end of the accursed thing. I shall have the concurrence of my hon. friend in stating that I represent correctly the substance of his counter resolutions. Now I put it at once to my hon. friend who supports the resolution now before this Council, and to my hon. and learned friend the mover of it, whether, in case the plan of my hon. friend had been adopted, anything in the nature of surplus revenue could now exist so as to give a colour to the grant of money now proposed ? But at all events this Council, in conjunction with the Executive, recommended that a certain portion of our surplus revenue should be otherwise employed than in the destruction of so much paper money, and be devoted to the exigency of our public works. I am not about to deprive my hon. friend (Mr. Ebdon) of the honour of resisting the remainder of the Council. Single-handed and alone he fought the battle of the Home Government. He did not follow a multitude to do evil. Whilst all the rest departed from what seemed to be their just allegiance, he stood forward the Abdiel of this assembly,

“ Faithful found

Amongst the faithless, faithful only he.”

Not having the fear of dismissal sufficiently before their eyes, the official members voted for promoting colonial public works before extinguishing the colonial debt to the mother country ; a proceeding upon their part somewhat extraordinary, and which my hon. friends afterwards accounted for, by stating that they were merely strangers and sojourners in the land, having neither permanent residence in the colony nor zealous interests in the advancement of colonial good. My hon. friend having thus accounted for the conduct of the official members in disobeying the Home Government, and shown that they did so, not because they took an interest in the colony, but because they took no interest in it,—proceeded, by a species of alchemy peculiar to himself, to transmute the preference given by him to the immediate cancellation of our paper debt to the in-

definite postponement of public works, into a proof of high colonial patriotism. In taking this view of the matter, I rather think my hon. friend was as singular as he was in his opposition to the resolutions of Col. Bell ; but be that as it may, such unquestionably was the view he took. Returning now, Sir, to the narrative of events (from which I was induced to turn aside by my anxiety to do that justice to my hon. friend which his interjectional remark appeared to call for), I beg to remind the Council, that what Her Majesty's Government refused to Col. Bell's memorandum, and to your Excellency's despatch supporting that memorandum, they also refused to the united appeal of the two Councils. The despatch which was elicited by the resolutions of this Council and the minute of the other, has been read in part to-day by my hon. friend the Acting Secretary to Government. It is, I think, sufficiently intelligible. There is nothing doubtful or diplomatic about it, nor does it veil its meaning in any studied ambiguity of phrase. A clearer communication was never found, and all official persons here must feel that it is written for their learning. It states, almost in so many words, that until the just debt due by the colony to the mother country has been liquidated, no appropriation of the public money will be permitted in furtherance of any public work whatever. It not merely directs you to apply all surplus revenue in the way suggested, but recommends you to outrun the tardy march of time by borrowing on debentures so as to bring all accounts at once to a conclusion. It enjoins you to destroy as far as your present means permit, and to borrow upon the credit of your future means as much as will destroy the residue. The communications of Her Majesty's Government do not rest here. They express great surprise, which, freely translated, may be termed some displeasure, that the resolutions which had been transmitted should have been laid before this Council for adoption by a stipendiary officer of the Crown. Now it may be that intimations of this nature may strike some of my unofficial friends as matters of very small importance, but there are others to whom they present themselves in quite another point of view. It is true, that what is said applies principally to the Secretary, Col Bell. But there are other

announcements which shew clearly enough that what is said to the Secretary is said unto all ; and, although myself a very small official, I do not feel myself so safe in insignificance as to be unmindful of the warning voice. What then is our condition ? Here we are,—a number of officials holding office during pleasure,—who are enjoined to obey, not the hasty or casual, but the long considered and oft repeated, injunctions which have been issued for the guidance of our public conduct. We have appealed, and then appealed once more, and Her Majesty's Government, after due deliberation, has affirmed its judgment, and warned us how we appeal again. Under these circumstances we are told that we are not precluded from supporting this resolution,—that somehow or other we may find a loop-hole of escape—that the public expects us to vote this money, and will be much disappointed if we do not. Now, for the life of me, I cannot see how this is to be done. I do not see how we can vote £1,200 with my hon. and learned friend in the teeth of our express directions to vote no sum whatever for any such design. Between our official obligation and both the resolutions now before the Council, there is a great gulf fixed. What then are we official members to do ? This is a question involving the ethics of official life, and the discussion of it can have little interest for my unofficial friends. Without, therefore, discussing it, I will venture to remark that the rational rule appears to be that no man, for the sake of office, should do anything which is morally wrong ; but, at the same time, that no man is called upon to relinquish office for the sake of what he may consider expedient, unless his relinquishment of office would have the probable effect of furthering the object which he esteems desirable. Ministries in England have resigned because they could not carry certain projects, and have, by so resigning, been borne back again to office upon the shoulders of the people, and then been enabled to carry their projects through. But let me know, I pray you, what good could possibly be done were all the official members of this Council to resign in a body, or be in a body deprived of office ? For myself, I do not hesitate to say, that looking to the forbearance which the Home Government has already

exercised, and to the unequivocal terms in which its expectations relative to my official conduct have been conveyed, I should feel as a man of honour, that I ought not to cast upon the Secretary of State the ungracious task of turning me out, and that I was bound, in sending home my vote for this resolution, to send a tender of my resignation along with it. Did I do so, how would you be better off? A better and an abler Attorney-General you could easily get. But that is not the question. The question is, would you get a new Attorney-General who would support votes of public money for public works and emigration—to vote the £1,200? Every other official member may say the same thing, and the only effect of the whole of us resigning, would be, that in place of the number,—is it seven?—by whom you are now possessed, there would come over seven other spirits more wicked than ourselves, and the last state of this Council would be worse than the first. How miserably vulgar, then, to raise, the cry “Oh these soulless officials are tied hand and foot!” Why, I will call upon any man of common sense and common honesty, to make the case his own, and if such a man should say I ought to resign, I declare to God I think, just now that I should do so. But no man of common sense and common honesty will say so. He will see at once that whatever effect my resignation might have in retarding, it could have no effect whatever in promoting the end which, for the sake of argument, I shall concede to be expedient. I have insensibly warmed a little upon this point, and speaking for my official brethren, have deemed it right to state their case, and call for judgment in their favour. But another question now arises,—is it allowable even for the unofficial members of this Council to contravene the deliberate instructions of the Home Government?

Mr. EBDEN :—Certainly not.

ATTORNEY-GENERAL :—That such is the opinion of my hon. friend, he has on former occasions furnished ample proofs. Then, sanctioned by the authority of my hon. friend standing on the vantage ground of his opinion, I ask the other unofficial members how, in consistency with the principle which he has often before promulgated, and has again this very moment recognized, they

can give their support to either of the resolutions now before us ? My hon. friend declares that it is the duty of this Council not only to refrain from opposing, but to act at all times in absolute conformity with the declared intention of Her Majesty's Government. He proclaims that when once a decision has been definitively pronounced, the members of this Council, as well unofficial as official, have nothing left for them but to carry it into effect. In the debates upon the currency, he always told us that we were wrong in what we were about, because we were flying in the face of the Home Government, by not carrying out the views which it had communicated for our guidance. Now will any man maintain that the very same question is not now substantially before this Council ? Will any man maintain that that is a difference in principle which is merely a difference in amount, and that £1,200 is one thing and £12,000 another ? No man will maintain this ; and now let us compare the cases. What was the case when Col. Bell carried the resolutions ? Why, because, perhaps, of his being a stipendiary officer of the Home Government and a stranger who took no interest in the colony, he wished to induce the Home Government to forego the immediate exaction of its debt, and to permit a judicious expenditure on public works. My hon. friend viewed the matter differently. His argument for the immediate destruction of the paper money, at all cost, was not derived from Cudworth's Immutable Morality, or the natural fitness of things, according to the theory of Butler, but adopting the opinion that the essence of obligation is obedience to the will of a superior, he said, "Her Majesty's Government have directed us to burn,—that is quite enough for me, and that should be quite enough for you official gentlemen, stipendiaries, and strangers." Will it be said that because Col. Bell considered (he might be right or wrong, but that is not the question) that the greatest exigency of the colony was the promotion of public works, and not the introduction of European labour,—and because he penned his resolutions upon that principle, that therefore the cases are distinguished ? Is it not clear that had Col. Bell been as great an advocate as ever existed for the introduction of

European labour, and had sought leave to issue money for that purpose, the argument of my hon. friend would have equally applied? If this distinction fails, will the change of administration be relied on? There may be many things which will be affected by that change, and people will form their own opinions relative to their expediency,—my hon. friend may not be found rejoicing at the dissolution of the late Government, and I myself, being what is commonly called a Whig, may not be found rejoicing either,—but upon this question of the paper money, we may be well assured that there will be no change of measures. The same men who are now in power are, in some degree, the same who were in power in 1825, when the colonial currency was changed, and from that time to the present, the course of the Home Government has been uniform and unchanged. If, then, no such distinctions as those to which I have adverted, can be drawn between our position at the time of Col. Bell's resolution and our position now, I wait with some curiosity to see how my hon. friend (Mr. Ebdon) will extricate himself from the dilemma. I am well aware of his ingenuity, but out of this dilemma I think he cannot creep. I should as soon expect to see him creep into a quart bottle. But it will here be convenient that I should notice more particularly the amendment of my hon. friend opposite (Mr. Ross). He has come in aid of us official members, and he considers that while there might be danger in supporting my hon. and learned friend opposite (Mr. Cloete) there can be none in supporting him. He has stated that his object has been to make his amendment "palatable" to the Colonial Government. The phrase "palatable" is in strictness metaphorical, and is commonly applied to physic. Adopting this application of the word, I must say that I do not think the one dose essentially differs from the other; and that they are distinguished chiefly by the different terms in which they are described; but as Dr. Ollapod, in the comedy, acutely remarks, "Names are nothing,—rhubarb is rhubarb, call it what you please." It is to be observed that my hon. friend (Mr. Ross) would devote even a larger sum than that proposed by my hon. and learned friend. True, he does not seek,

as does my hon. and learned friend, to put any sum whatever at once upon our estimates. But this is a distinction which scarcely amounts to a difference. The observation which I have already made, will shew the Council that the matter in hand cannot be managed by simply making a difference in our form of proceeding. Indeed, of the two propositions, I think,—were I a freeman like any of my friends opposite, and disencumbered of the golden chains which fetter the limbs of us officials,—I should rather vote for the original resolution than for the amendment. My hon. and learned friend may say, “I wish to make myself attended to, and to prevent what I am about from passing without notice, and, although conscious of some irregularity of form, I am prepared, in order to do a great right, to do a little wrong, and take the decided step of placing my views on the estimates in the shape of an actual vote.” This course of proceeding may have its recommendations, and is scarcely open to any objection which may not be urged against the amendment submitted by my hon. friend (Mr. Ross). It is, however, a course of proceeding which, for the reasons stated, I consider that this Council cannot adopt. But my hon. and learned friend (Mr. Cloete) joins issue with me here. He says that by reference to Col. Bell’s memorandum and the resolutions of this Council, it will be found that both contemplated a re-issue of paper money. He farther says, that it is against this re-issue of paper money that Her Majesty’s Government has set its face. But his plan, he says, involves no re-issue of paper money; and therefore does not come under the ban of the Secretary of State. A moment’s reflection will shew that the matter is just as broad as it is long, and that there is no weight in what has been urged upon this point by my hon. and learned friend. It so happened that when Her Majesty’s Government were considering this paper money question they were not aware of the actual balance in the military chest, but they were feelingly alive to the fact that for every £101 10 lodged here with the Deputy Commissary-General, that officer gave a bill for £100, which the Lords of the Treasury were under the necessity of raising funds to meet. A late celebrated

statesmen once spoke in the House of Commons of an ignorant impatience of taxation on the part of the people; and there certainly was an impatience, which it would be very useless to call ignorant, on part of the Treasury, of the duty of borrowing money to pay our debts. Under these circumstances we were directed to replace what we had borrowed from the bank, and then destroy an equivalent amount of paper, the effect of which would be to annihilate, to that extent, the irksome guarantee. In refusing their permission to re-issue, Her Majesty's Government refused what we now seek, even when it was presented in a less objectionable form. For had we re-issued, there was no reason to believe that all the paper so re-issued would have been tendered for Treasury Bills. Some of it, one would think, must, from the operation of obvious causes, have been kept in colonial circulation in order to facilitate domestic remittances. It is clear, then, that for whatever amount should be kept in circulation no bills could be drawn, and therefore no funds need be borrowed. At present we are aware that almost the whole of the existing paper money is in Mr. Palmer's chest. In other words, bills have been drawn for it, which Her Majesty's Government have had to meet. With what reason, then, can it be urged that the same Government which would not permit a re-issue of notes, because there was a probability that those notes would ultimately come to it for payment, would nevertheless allow an issue of specie to be made, whilst those notes (re-issued in the ordinary expenditure of Government) have actually come in for payment, and lie in the chest as vouchers for an existing debt? When we had notes the Home Government said, "Don't issue them for public works or emigration, for they will come to us to be paid in bills." Well, now that they have been paid in bills, will not the Home Government say, "Don't issue specie for public works or emigration, until you have paid the notes which now are lying on our hands." To say, therefore, that we may send our sovereigns in any way that we like, and that anathema maranatha has only been pronounced upon a paper issue, would be to lose sight of the circumstances of the case, and to disregard the force of an *a fortiori* argument. I trust that I have

now satisfied all who have done me the honour to pay attention to my observations, that the instructions of the Home Government, with respect to the subject matter of these resolutions, are too plain to be mistaken, and too absolute to be withstood. What then, I ask, is Government to do? Unofficial members, I admit, are differently circumstanced. They may sometimes find it expedient to ask for what they are distinctly told will not be granted. Even in importunity itself there is a certain virtue. But no official member of this Council can properly support any resolution which, by devoting any sum whatever to the furtherance of public works or immigration, contravenes the express and repeated injunctions of the Home Government to apply all surplus revenue in diminution of our paper debt. To the official members, therefore, their course is plain and clear. And if there be any unofficial member who seeks to combine a support of any one of these resolutions with an adherence to his oft repeated declaration, that the will of the Home Government, whenever it is distinctly enunciated, should be omnipotent with this Council, I call upon him to state distinctly and intelligibly the grounds for his proceeding. I am not deaf, indeed, to what is passing out of doors. I hear, as all other persons do, the common cry, that something must be done; —that, really, this won't do; —that we must, by hook or crook, contrive to go a-head a little. Is it not, however, plain and clear, that if we cannot go a-head without postponing the payment of our debts, Her Majesty's Government have taken right good care that we shall not go a-head at all? They will permit you to borrow any sum which may be necessary for the destruction of the paper money; but they will not permit you to borrow even so small a sum as £20,000 for the purposes of public works and immigration. And here, Sir, were it of any practical importance so to do, I could not but observe upon the miserable inadequacy of the sum suggested. With £20,000 how little could be done! Why, one work alone—a great and important one, and one which I hope to live to see accomplished—I mean a hard road across the flats,—cannot fairly be estimated at a lower charge than £30,000; and thus, when roads and immigration are combined together, to vote but £20,000 for both, appears almost ridiculous.

Mr. CLOETE :—There is nothing about roads in my resolution.

ATTORNEY-GENERAL :—My hon. and learned friend is correct in stating that his resolution refers alone to emigration. The amendment of my hon. friend opposite (Mr. Ross) refers to public works as well. But if what I formerly stated in this Council as to the expense of emigration have any foundation in fact, it cannot but be clear, that such a sum as £20,000 could produce no practical result. I presume that my hon. and learned friend himself feels that we are still only in the day of small things ; that his vote could do no more than simply make a beginning. He obviously wishes, if he can, to insert the small end of a wedge, which driven home hereafter by strong colonial hammering, may split asunder even the rooted opposition of Her Majesty's Government. In this point of view, the smallness of the sum to which he has confined himself may not be considered injudicious. But are we to despair ? Is our case hopeless ? Can nothing be devised or done ? For my own part, I can imagine but two measures to which we can resort. We hear a great deal of quitrents in arrear—of taxes not collected—and of the unsound state of our finances generally. Let the excitement upon these subjects turn itself into the shape of a petition to the Secretary of State, praying him to appoint a commission to inquire into the revenue and expenditure of the colony. Let it thus be ascertained how your funds can be increased, or, what comes to the same thing as regards the matter now in hand, how your outlay may be diminished. I see that my venerable friend at the other end of the table (Mr. Breda) looks ominous and shakes his head. He does not like commissions of inquiry ;—perhaps his antipathy is not ill-founded. Such commissions for the most part chip and rasp ; but they do not always chip and rasp in the right places ; and it may, perhaps, be doubted whether any little saving which might chance to be effected would compensate for the trouble and expense which such a commission would entail. I think I may venture, however, to say, that the Government of this colony is conscious neither of corruption nor negligence, and that it will shrink from no inquiry ;—while the official members of this Council are perfectly willing to submit their services and their salaries to any ordeal which the

Secretary of State may think proper to apply. The idea of a commission does not seem to be approved of. I know not whether what I have next to throw out will meet with more success. Will you petition the Secretary of State for leave to impose an assessment upon the immovable property in this colony—not to exceed one penny in the pound, nor to continue beyond a certain number of years, and to be applied exclusively to the promotion of public works and immigration? If you will, Lord Stanley will give you leave, or I very much mistake the man. Observe, that this assessment would form no part of the ordinary revenue, and would constitute a fund as separate as if it were the proceeds of voluntary subscription, vested in distinct trustees. Under these circumstances it is very clear that Her Majesty's Government would not think of regarding it as belonging to that species of revenue which they consider a security for their debt. With such a fund as this assessment would produce, a principal board in Cape Town, and local boards in the districts, much might be accomplished in the way of developing the resources of the colony; and the language of a despatch of Lord John Russell's, which was laid some time ago before this Council, would seem to countenance the idea that the principle of local taxation for public works is one which Her Majesty's Government is not indisposed to countenance. Here, then, is a mode of assisting ourselves which looks like practice. The plan is only proposed for want of a better, and will be withdrawn the moment a better is suggested. It is necessary to make our ideas upon this subject somewhat more definite and distinct than they are for the most part found to be. My hon. friend beside me (Mr. Ebdon) is very fond of saying that he does not despond of the financial state of the colony; and I am glad to find that a view so cheering is entertained by so competent a judge. But, after all, we may talk in this way to the end of the chapter, without thereby securing a single practical advantage.

“No man can hold a fire in his hand

By thinking of the frosty Caucasus;”

nor will our thinking of a full treasury fill an empty chest. Anxious to get out of the region of barren generalities,—sick of a state of

all saying, and no doing, I have ventured to throw out what appeared to me the most feasible means of accomplishing the ends in view. To neither of these ends am I indifferent. When they come into conflict, I prefer public works to immigration ; but I repeat to-day, what I said yesterday, that I am not indisposed to give emigration a fair trial. My hon. and learned friend says, that he anticipates no opposition to his plan from the Home Government. Our former projects, he states, were of a purely colonial character. In our public works Great Britain could have no immediate interest ; but with immigration from the mother country, he thinks the case is different. Every immigrant removed would be a direct relief to England ; and this consideration, he imagines, must necessarily have great weight. Sir, I admit and deplore the destitution which now pervades the mother country. There is much poverty there, and much want of employment. I wish most fervently that a portion of that idle population could be introduced into this colony:—

“ Oh that we now had here

But one ten thousand of those men in England

That do no work to-day !”

What ground, however, have we for imagining that the Home Government will forego the payment of what it has always considered a just debt, in order to enable you to import even the redundant labour of Great Britain? From Lord Stanley's reply to Mr. Roebuck, it seems certain that while ministers are disposed to facilitate, as much as possible, all voluntary emigration, they will not consent to export their pauperism at the national expense ; and it is obvious that to do what my hon. and learned friend requires, would be, in their view of the case, an infringement upon this principle. Sir, I foretold, when I set out, that I should be desultory in my remarks, and I think that I have sufficiently fulfilled the prophecy. If, however, I have succeeded in making myself understood, I think I have vindicated the line of conduct which the official members will probably pursue ; that I have laid some grounds for inducing the unofficial members to pause before supporting either of the

resolutions now before us ; and have exposed the hollowness of every hope in favour of public works or immigration, which is founded upon the abandonment by the Home Government of the position which they have so long and so consistently maintained. I have further taken upon me to suggest a mode in which the colony might, if it thought proper, put its own shoulder to the wheel, and cease to realize the fable of the clown and Hercules. I now sit down, trusting that something will be devised to meet the demands so loudly urged on every side, or that, in case it shall appear that the public is unprepared to make any hearty effort in behalf of the good cause, that they will then see the propriety and decency of stilling clamour and being quiet.

AGAINST THE IMPORTATION OF JUVENILE CRIMINALS.

[*Legislative Council, May 25, 1842.*]

ATTORNEY-GENERAL :—In the present position of this question it is not, I think, advisable to enter upon its merits at any length. But I cannot help observing, that I feel very strongly the impolicy of introducing into this colony such parties as those whom it is intended to transmit, and that I concur in every expression of dislike to the measure which has been uttered here to day. Even in the mitigated shape of an experiment, I am altogether adverse to the plan. No doubt so small a number as fifty of these convicts could do but little harm, but if the principle be an evil one, it must be resisted at the threshold, for if the measure shall be found to work conveniently—and work conveniently it is likely to do for one party or the other—it is impossible to calculate the consequences to which it may ultimately lead. As at present impressed, my deep conviction is, that if this colony wanted labour ten times more than it actually does, if such labourers as we now contemplated were left here free of all expense, and if they were to be

apprenticed out amongst the farmers gratuitously, to serve them, without wages, or reward the evils inseparable from the importation of such a class of persons would immeasurably counterbalance any apparent advantages which their introduction might present. Brought into contact with the comparatively harmless criminals of this colony, with the late apprentices, and above all with the liberated Africans recently spread over the land, I cannot undertake to estimate the risk and danger which a horde of English convicts, however youthful, must necessarily entail. These liberated Africans, I rejoice to know, are at present well conducted, but their good conduct is the result of temperament and circumstances, and not of moral principle, and how long they will continue as harmless as they are now, when they shall have been placed under the tuition of English masters, who, though young in years are old in crime, is a matter worthy of the greatest consideration. The circumstances of the colony are not suited for the control and reformation of such criminals. Scattered over a vast extent of territory like ours, you must either grant to the masters such power as will make the convicts virtually slaves, or else leave the convicts such a degree of liberty as must lead to additional licentiousness. In fact, I cannot see any way in which the plan, approved of, doubtless, from motives of benevolence, can work happily or well ; and I trust that the Secretary of State will learn from the right thinking and right feeling part of our community their views upon this question, in sufficient time to avert what, I fear, would form a most injurious measure. There is no man more open to argument than the Secretary of State, and it is not, perhaps, yet too late to induce him to re-consider the project, and it may be, to give it up. In the Executive Council it will be my duty to give whatever assistance I am able to afford in the framing of such regulations as may appear best fitted to accomplish the ends which his Lordship has in view ; but still, I feel that I am here in double trust, and I do not think that any official considerations will prevent me from expressing the views which I am led to form. Nor, indeed, on a question of this kind, could I well permit myself to be withheld by such considerations even if they did exist. I fear

that Captain Wolfe, with the best intentions, has done some mischief. No doubt if we were to lose sight of our merely local interests, and take as our standard of expediency an abstract attention to being in general, much may be said in behalf of the views which the Commandant has urged. It is idle to contend, looking to the interests of the convicts themselves, that those would not, in all probability, be promoted by a change of place, since idleness is the prolific plant of crime, and since in this colony there is more demand for labour than there is in England. Those convicts, Captain Wolfe truly says, are a nuisance to the mother country. Now it may be all very well for A to wish to get rid of a nuisance, but if B be wise, he will not let it be laid down upon his premises. I should write up in very large letters for the information of our rulers in the mother country, "Commit no nuisance here." A metaphorical public writer, in speaking by anticipation of this subject, compared, some time ago, these juvenile convicts to "young serpents." This was eloquence, and, as I myself, hate eloquence, I shall not absolutely adopt the epithet. But using it for the purpose of illustration, I may remark, that while a country in which young serpents notoriously exist in great numbers can scarcely feel that portion of relief which could be afforded by the largest practicable exportation, the country to which they are conveyed may soon expect to see swarms of them, for they are creatures which have a tendency to multiply. What ought to be done, in the present position of affairs, it is not for me or even for the Council to determine. It is, however, to be hoped that the public, taking an enlightened view of its true interest, will respectfully call the attention of Lord Stanley to the subject, and dissuade him from carrying the project into execution. My hope, I must say, is not a very sanguine one. I trust I shall not be thought to slander the inhabitants of the Cape when I say, that so short sighted are the majority of them in matters of this kind,—so incapable of duly consulting their permanent advantage, that if your Excellency were to announce in the next *Government Gazette* that such a measure was contemplated, and that all persons willing to take such apprentices were re-

quested to send in their names, and the number of convicts whom each would receive, I have little doubt that, within seven days, you would get applications for five thousand. I may be wrong in this calculation, and I should gladly be refuted if I am in error. But I will not affect a confidence which I do not feel, and I throw these observations out as a taunt to the colonists. Let me see whether they will take any steps to repel it as they ought.

AGAINST THE IMPORTATION OF JUVENILE DELINQUENTS.

[*Public Meeting, Cape Town, July 4, 1842.*]

The Hon. Mr. PORTER :—I feel pleasure, Mr. Chairman, in seconding this resolution. It is true that in another place I have already expressed an opinion upon the important subject to consider which this meeting is to-day assembled. But I cannot think that I am thereby precluded from declaring concurrence in the general views which have been here advanced, nor am I conscious of acting improperly in taking a position which I am always glad to occupy—that of meeting, as a citizen, the rest of my fellow-citizens, in order to deliberate upon any matter vitally affecting the public welfare. What I said in Council, Sir, relative to the introduction of juvenile delinquents into this colony was, from the suddenness of the occasion, necessarily unpremeditated. I have, since then, considered the subject maturely, and the result of that more mature consideration has only been to fix more deeply in my mind the apprehensions which, from the first, the project of importing convicts into the Cape powerfully excited ; to convince me, thoroughly, that the measure suggested by Capt. Van Reenen and acceded to by the Secretary of State will, if carried into effect, inevitably produce evils of which it would be difficult to over-estimate the nature and extent. Sir, I do not come here to denounce the projector of the plan. He has not, certainly, been very

favourably received to-day. But he has too much good sense, and too much experience, not to feel, that he has only been exposed to that sort of discourtesy which every man must expect to meet who stands up, at a public meeting, to advocate opinions to which that meeting is strongly and almost unanimously opposed. Speaking for him, then (which I may be permitted to do, seeing there was some difficulty found in allowing him to speak for himself), I should say that it would be very wrong indeed to pronounce any censure upon his moral sentiments, and, still more, upon his moral character. This meeting is not called upon to pronounce any such censure. He has solemnly disavowed any other motives as actuating his conduct, than, on the one hand, a benevolent desire to benefit the convicts themselves, and, on the other, an anxious wish to meet, if possible, the colonial demand for labour. You believe, and so do I, that, misled by these motives, he has erred in judgment, and you have a right, and so have I, to state what we believe; but, to proceed farther, and draw any harsh or uncharitable conclusions, would be both uncalled for and unjust. Quitting now Capt. Van Reenen, it is scarcely necessary to defend the Secretary of State. He needs no defence. Be this project good or bad, his motives in acceding to it are obviously such as do him no discredit. A mode is submitted to him, in which some unhappy beings may be benefited; and feeling for those, who have but few to feel for them, he over-looks its advantages, and gives it countenance. Consulting chiefly for the welfare of the convicts, he seeks to promote it by sending them out here. But will his doing so really promote their benefit? This view of the question has not been dwelt upon to-day. Very naturally, the measure has been hitherto considered with reference to the mode in which it would affect our own interests, rather than to the mode in which it might affect the interests of the convicts themselves. In proceeding to offer now my thoughts upon a matter which is still worthy of remark, I would observe, that we have to do, not with the reveries of benevolence, but with the rugged realities of life, and that it would be idle and absurd to

dream of a number of youths, snatched from ruin in the mother country,—and after being washed clear of all their casual contaminations by the salt sea water applied upon their passage out,—happily apprenticed, on their arrival, to masters deeply conscious of the responsibility of the charge which they undertake, and certain to spare no pains in cultivating the minds and morals of the boys. All such romantic expectations must be vain. Those who, beyond all living creatures, would require the most careful and judicious training, will receive absolutely none. The education of the young, even under the most favourable circumstances, is a serious and solemn thing, and a gentleman who preceded me (Professor Changuion) touched upon this topic with right and proper feeling ; but when the educator has not so much to implant good as to uproot evil,—when habits which have become a second nature are to be overcome, when, in one word, the convict is to be reclaimed,—who can deny the tenfold difficulty of the task ? Without their moral regeneration these convicts can never attain to social respectability, and such moral regeneration the masters whom they will get will never think of working out. Is this true or not ? In order to examine it a little, I shall put the matter in two ways. These convicts must either be apprenticed in our towns and villages, or else in the open country. I assume that it would not be desirable to apprentice them in towns. (Capt. Van Renen intimated assent.) I observe that Capt. Van Renen agrees with me in this, and, indeed, no one who reflects upon the dangerous facility of communicating with each other, which would exist were the convicts located in towns, and the additional opportunities which towns would present for the commission of the very sort of crimes to which the convicts would be most habituated, can fail to see, that if the delinquents are to be reclaimed at all they must be removed as much as possible from temptation, and apprenticed in the open country districts. But if you place the convict in the country districts of this colony, how are you to protect him from that oppression which his condition must invite ? Labouring as you do under the inevitable evils of a scattered population ; with no rural police

and with no remote magistracy, the apprentice must depend for protection upon the stated visits of some officers who might be nominated for the purpose, and the occasional interposition of some well disposed Field-cornet. From even the frail protection of public opinion the convict will almost necessarily be cut off. I state then my deliberate conviction, that no regulations which it is possible to frame, and no activity which the local authorities could possibly exhibit, can adequately protect a number of juvenile convicts apprenticed throughout the country districts of this colony. Everything must, in most instances, depend upon the master's will and pleasure. No doubt if you can find masters fit to be entrusted with absolute power,—masters who are impelled to receive the apprentice only by the interest which they take in his reformation and advancement, all may yet be well. But what kind of masters are they who will press forward to obtain apprentices of such a character as these convicts bear? Sir, my friend Capt. Van Renen, and my friend, Capt. Wolfe, have stated in support of the measure now under discussion, that many masters will be found to offer who will receive convicts as readily as they would any other class——

CAPTAIN VAN REENEN :—No, no.

MR. PORTER :—Well, it may be that I state this point too strongly. But this, at least, is clear, that my friends have stated, that masters for any number of convicts would readily come forward. Is this readiness, then, an argument for the measure? Sir, in my judgment, it is an argument against the measure. Is that man who, as the father of a family, rushes eagerly to seize on convict labour, stimulated by its supposed cheapness—is that man, I ask, a person who has a due sense of moral obligation; or one who is likely to perform the difficult and delicate duty which is involved in the care and education of a youthful convict? No man is fit to discharge that duty who does not feel the responsibility of undertaking it. I should hesitate very much to give a young convict apprentice to any man who told me that he would not hesitate to take him. The moment a man evinces a reckless anxiety to obtain such labour, that moment I conclude that

he is the most unfit man under heaven to be entrusted with it. Sir, connected with this topic, there was an observation made by a gentleman opposite (Mr. Scrutton), on which I would like to say a word. Allow me, first, Sir, to observe, that I heard that gentleman with pleasure, although it would appear that with the majority of the meeting it was a little otherwise. But he is a philosopher, and judging from the fortitude with which he endured all expression of popular impatience, I should pronounce him of the stoic school ; and I have to congratulate him upon carrying into practice with so much success the principles of Epictetus. Sir, the observation upon which I wish to remark is not that which the gentleman made in reference to the clergy, and which was so properly rebuked, upon the instant, by my learned friend Mr. Brand. I certainly never, at any time, remember to have heard a more unfortunate allusion. Sir, the ministers of the Gospel would have forgotten their duty, they would have departed from that line of conduct which they are bound to pursue,

“ As ever in their great Task-master’s eye,”

if upon a question of this kind,—a question which has no concern with politics or party, but one which vitally concerns the moral and religious condition of the community, they had not come forward to head their flock in giving to the measure proposed their conscientious opposition,—and if they had found amongst their people any symptom of apathy upon such a subject, it would have well become them to rouse the parties from it by the exercise of that legitimate influence which every clergyman, who is worthy of the title, naturally and properly possesses. In this case, then, of schoolmaster *versus* clergyman,—I am clearly of opinion that the defendant has the best of it. The gentleman will allow me to say, that, as a zealous friend to education, I am always glad to see, as I have done upon this question, the “ schoolmaster abroad ;” and I have only to express my hope, that when next he quits his calm retreat, he will consider a little better the lesson which he undertakes to teach. I come at last, Sir, to the remark which I wished to notice. The gentleman stated, if I rightly understood him,

that young criminals had in former instances come to the colony and been apprenticed here, without opposition or observation, and he contended that you could not consistently draw any line between those parties and the convicts now in question. You have received, he says, apprentices who were delinquents in fact, if not in form; and you should not now object to receive apprentices because they happen to be delinquents both in fact and in form, since the difference between the cases is merely nominal. Sir, the gentleman refers, of course, to the juvenile immigrants; and admitting just for a moment, and merely for the sake of argument, that the cases are somewhat parallel, I wish to direct the attention of the meeting to the state of the juvenile immigrants. I have lately read the pamphlet of the Rev. Mr. Saunders. I have not been convinced by it. I cannot doubt but that this writer, whose motives we must all of us admire, has overstated the evils and understated the advantages of the juvenile immigrants in general. But there is one point on which he dwells, which is, I presume, indisputable,—for his testimony is corroborated by the special magistrates who conducted the inquiry instituted by His Excellency the Governor,—I mean the destitution of instruction to which the immigrants are subjected. They may, perhaps, be well fed, well clothed, and well lodged, generally; but they are not well taught, or rather they are not taught at all. This is a circumstance which could not be avoided in places where the Boer can scarcely find means of educating his own children, much less his immigrant apprentices; and it should not be lost sight of when we are endeavouring to ascertain the probable condition of another description of apprentices, who, beyond all others, stand in need of testimony. But the truth is, that between your former immigrant apprentices and your future convict apprentices, there is scarcely the least resemblance. Very few, indeed, of the juvenile immigrants were criminals, for, greatly to their own credit and to the public advantage, the committee exerted themselves strenuously to exclude all young persons of notorious bad character. The few very young thieves, who, at the beginning of the experiment, may have been smuggled in amongst the rest, were lost in the number of chil-

dren of untainted reputation. This is one great distinction. But perhaps a distinction still more marked is to be found in the simple fact that whatever the juvenile immigrants were, at least they were not convicts. I believe that, in many instances, the fact of conviction is more injurious to the character than the commission of crime. So strongly am I impressed with this idea, that I should be disposed to entertain more sanguine hopes of a given number of persons who had merited conviction, but yet had escaped conviction, than of the same number of persons who had been convicted without having really deserved it. This may appear a paradox. But it will, perhaps, appear a paradox to no man who considers the influence which a conviction must exert as well upon the convict himself as upon those with whom he comes in contact ; how careless the man or boy becomes who has once been publicly deprived of character ; how there exists for him no such *locus penitentiae* as that which may still be open to those who were at one time, perhaps, much worse ; how there may, almost, be written above the convict's cell, what the great poet of Italy saw inscribed over the portals of eternal woe,

“ All hope abandon, ye who enter here.”

Sir, it is true that I have now been speaking of the convicts' personal character rather than of their social condition. But the two things go together ; and so, were you even to conclude, contrary to the fact, that the convict apprentice was, in all, save the fact of his conviction, better than the former immigrant apprentice, it would still by no means follow that he would not run the risk of being much worse treated. What would be his occupation ? Why, it would be that to which too many of the juvenile emigrants are put, even now ;—herding cattle in the fields ; without distinction of days, or variety of employment ; his only companion some stray Hottentot, and his only indulgence the gratification of licentious passions. He will gradually combine the vices of his former state with the vices of his present, and join the worst influences of civilized, to the worst influences of savage life. Upon this subject, as my friend of the *Commercial Advertiser*,

who says he hates eloquence, is not present, I shall venture to be eloquent, though not in my own language, but in that of William Wordsworth, and I say that your convict apprentices will answer somewhat the description which the poet gives of his pedlar hero, Peter Bell,—

“To all the unshaped, half human thoughts
Which solitary nature feeds,
Had Peter joined whatever vice
The cruel city breeds.”

I confess, Sir, that when I reflect upon the sort of character which the juvenile convict must be expected to possess, and the circumstances with which, possessing such a character, he would be generally surrounded, I can anticipate nothing else than that he will sink, from depth to depth, into still deeper degradation, and hopeless of ever emerging, become miserable himself, and mischievous to the community. Some farmers may still long for them. They may say to themselves, “He is too young for cattle stealing, and whenever he comes near the house we can turn the keys ; keep a strict look out, and as soon as possible, dispatch him to the bush again ; so, as we shall have him cheap, we will make him serve our turn.” But are masters who think in this way to be trusted ? Believe me they are not the men to kill with kindness. And how, I ask again, are the apprentices to be protected from oppression ? The shambok is laid on, both hot and heavy : —what is the reason ?—Oh,—“the fellow is incorrigible, do you not know, he came to me a convict !” He is badly used, for, of course, as a convict he deserves it all ; he is left totally without instruction, for, of course, as a convict, he will learn nothing good,—he is punished severely, why not ?—he came here as a convict, and of course, should be punished ! Sir, I say nothing which any man can justly deem invidious, when I say that, at the Cape of Good Hope, as at every other place, the exercise of absolute power is apt to degenerate into oppression, and that absolute power it appears to me that the character of the convict and the circumstances of the country districts of this colony, would virtually place in the hands of the generality of masters. If the real nature of the case were laid before Lord Stanley, I greatly

doubt whether he would consider the prospects presented here, for the youths in question, such as to render him anxious to realize them, and whether his Lordship might not deem that the money which it would cost to settle the convicts at the Cape, could do for them if expended in some other way. Having thus, Sir, adverted to the merits of the project, as far as the apprentices are concerned, the effect of the measure as it regards the colony yet remains to be considered. Upon this part of the question, I need not dwell. It has been exhausted by preceding speakers. Professor Changuion, Mr. Watermeyer, and my learned friend Mr. Ebdon (whose able and animated speech I listened to with pleasure), have urged many important topics with much earnestness and force, and have, in my opinion, clearly proved, that every principle of enlightened expediency would be outraged by the introduction of such labourers, as those against whose transmission you are now remonstrating. It may be said that I have spoken too much of hard task-masters, and have been guilty of overlooking masters of an opposite description. Be it so. I certainly do not augur favourably of those masters who covet convict labour greedily, and I believe that the best part of our rural population will have nothing to do with it. Admit, however, that a master may here and there be found, who feels for man's infirmities, and who by a certain generosity of nature, will forget the condition and character of the convict, and treat him in a different fashion from that which I have formerly described. This man will keep the boy about his dwelling,—employ him as a domestic,—and thus, in a place, where, as amongst every coloured population, a white face is a species of distinction, the London convict will become the companion of the sons and the daughters of the family, and communicate the vices into which he was early initiated in that great city, which, within its ample bounds, shuts in more sin of every sort, than, of old, sank Sodom and Gomorrah! But it is not alone of the farmer and his family that we are called upon to think. There are other classes whom we are bound to keep in our remembrance. Sir, I appear as counsel for the juvenile immigrants already in the colony. On their behalf I supplicate that their prospects in life

may not be blasted by such a measure as is now proposed. When you consider the want of accurate information which exists in this colony, and the points in which the old emigrants and the new will necessarily resemble each other,—both classes young; both apprenticed in a certain form by Government,—both sent out from England,—the result will be that the two parties will become insensibly confounded in the minds of our colonists, and the effect of that confusion will be, not to raise the convict immigrant to the level of the immigrant of untainted character, but, on the contrary, surely, though perhaps slowly, to sink the immigrant of untainted character to the level of the convict. The juvenile emigrant has difficulties enough, even now, to struggle with, and we should strive to place no additional obstructions in his path. Consider too the condition and the claims of your emancipated slaves. The state of crime amongst this class at present, is truly gratifying. But it is no aspersion on the character of our coloured population, to say that the comparative absence of crime amongst them, arises rather from temperament and circumstances, than from any fixed moral principles. Give them teachers and they will be sure to learn. When they do set about stealing, at present, they seldom go knowingly to work, but let them be instructed by masters who have graduated in the great University of London, and I have no doubt, that their proficiency will occasion much more surprise than pleasure. That any lessons given would be thrown away, I do not think, for there is a dash of cunning in the character of our coloured people that only requires to be dexterously directed, in order to form as accomplished rogues as need be. Finally, Sir, let us turn our eyes upon the liberated Africans, lately introduced. England has done much for these poor people, and she ought not now to risk the spoiling of her own good work. The colonists, to their honour be it spoken, have also done their duty. Exertions are being made for the improvement of this class. But in vain shall you open your evening schools to teach the liberated Africans what duty is, and the eternal obligation of honesty and truth. Bring the convict in, and he too will have his evening schools, where he will teach how

the master may be choused, and the mistress baffled, and how a lie well told can cover everything, and where he will contrive to do more mischief in one year, than all the schoolmasters you can employ will eradicate in seven. Sir, I have now adverted to the grounds upon which I am compelled to view the proposed experiment with undissembled fear. I say again, that you should cast no reflection upon Captain Van Renen's motives. Still less have you any reason to arraign the conduct of the Secretary of State, and I have admired the just discrimination which has led, to-day, to the avoidance of every topic of offence. Lord Stanley has and can have no unworthy end in view ; and it is, I think, a gratifying thing, at a period when the state of public affairs, both foreign and domestic, presents so much that might well engross the mind of every statesman, to see the Secretary for the wide extended colonies of England,—to whom is mainly entrusted the government of an Empire on which the sun never sets,—turning for a time from the consideration of all that is commonly thought worthy of the name of politics, and consulting how best he can provide, at the Cape of Good Hope, for a number of poor, outcast, friendless boys, confined for their offences in Parkhurst penitentiary. But while I give all honour to the motives of Lord Stanley, I must yet believe, that he has allowed some partial and temporary expediencies to weigh too much with him, and that a more comprehensive and far-sighted view of the entire question would have led him to a different result. I, therefore, rejoice, that from this meeting ; from the Cape Town clergy ; from the Municipal body, and from other quarters, which may yet express their sentiments, his Lordship will learn, that the judgment and feeling of the religious, the moral, and the right-thinking part of the community, are combined against the project contemplated ; and I trust that he will pause and consider before he carries it into final execution. That the result of farther consideration will be his rejection of the plan, I entertain a steadfast hope. He will not, I think, when he is made acquainted with your real views and wishes, pronounce, against your will, the awful sentence, that the Cape of Good Hope shall be henceforth a

convict colony. He will feel, both as a moralist and as a statesman, the full import of this formidable phrase. When he sees, that, notwithstanding the demand for labour, and the strong temptation of delusive cheapness, you count all such consideration but as the dust of the balance in which the attendant evils of the measure are weighed, he will hesitate to send a number of young convicts here, to import the vices of civilized people, and imbibing, in turn, the vices of comparatively savage life. From the interposition of your clergy, I look for much good. With sacred fire in their censer, like the high priest of old, they take their stand between the colony and these convicts, between the living and the dead, and you may well hope, that the plague which threatens you will even yet be stayed. Sir, one other word, and I have done. It is intended to expose a confusion of ideas, which some persons fall into in reference to this subject. Speak to them of the danger of contamination, and they reply, "Oh! a few convicts can do no harm." Speak to them of the impolicy of uselessly running any risks at all, and they rejoin, "Oh! the colonial want of labour must, somehow or other, be supplied." But these positions obviously destroy each other. We must not blow both hot and cold together. If a few convicts can do but little in the way of supplying contamination, a few convicts can do just as little in the way of supplying labour. The converse of the proposition will hold with equal clearness, and thus there are presented the two horns of a dilemma. *Utrum horum mavis accipe*,—impale yourself on which you please—but upon one or other of them those must be fixed who cannot introduce a small number of convicts without depriving themselves of their only reason for introducing any, or introduce a large number without depriving themselves of their only reason for disputing the existence of preponderating evils. Sir, leaving the reasoners, to whom I refer, in this predicament, I conclude by congratulating this meeting upon the feeling which it has this day exhibited. You may want labour to develop the resources of your colony, but you feel that it is not by convict labour that the pillars of your prosperity can be permanently established. You feel that there is inherent in it a principle of corruption and decay. You feel that morality is the only cement

which can bind the social edifice firmly together, and, regarding convict labour, as essentially immoral, you refuse to daub the wall with such untempered mortar.

ON THE RIGHT OF THE JUDGES TO ADVISE THE CROWN ON CONSTITU- TIONAL POINTS.

[*Legislative Council, August 13, 1842.*]

ATTORNEY-GENERAL :—Sir, I do not object to the Judges conduct and opinions being canvassed freely. I am not myself an admirer of their letter. I think it questionable in some principal points, and there are some minor matters which I should have wished had been struck out. But I cannot think that there is anything in that letter which fairly called for the peculiar tone and temper which have marked the animadversions of my hon. friend. And with respect to the insinuations in which he has so liberally dealt, in reference to the Executive Government. I hope that your Excellency and each member of that Government can lay a hand upon a heart as honest as any that ever beat in the bosom of my hon. friend, and say——

Mr. EBDEN :—I made no insinuations against the Executive Government.

ATTORNEY-GENERAL :—I am glad to hear this broad disclaimer. If this be so, let my words go to the winds. But I speak in the hearing of those who heard what my hon. friend said—or rather who heard the speech he read, leaving it to them to judge of the accuracy of the hon. gentleman's recollection. Sir, I am not here to speak on behalf of the judges. I do not come here to be their counsel. Let the hon. member complain of them to the Secretary of State, if he thinks that they deserve to be complained

of. But while I indignantly disavow everything like partizanship, I must be still at liberty to express my opinions with respect to the mode in which their conduct should be censured. Their law is fair game, and we have had to-day from the hon. member a vast deal of law. I said, the other day, that this Council, considered collectively, was not a learned body. But the host of authorities which have this day been referred to, certainly go far to redeem our legal character. Where on earth he contrived to gather all his law would be difficult to say, though I may, perhaps, venture to guess. If I be right, he could not have resorted to a quarter where, in every respect, it was so natural and so fitting he should seek assistance upon a subject of this kind. But, respecting as I do, the motives which led to that assistance, and entertaining as I do, a high opinion of the ability by which he was assisted, I cannot but lament that something more pertinent to the matter in question was not placed in the hon. member's hands. I have read somewhere—I regret that I opened with too much heat to be much in the vein for story-telling—an anecdote which comes into my mind in connection with this subject. Dr. Burney, the author of the *History of Music*, somewhere wrote, in reference to his account of ancient music, that he had looked at the classics through his son. Hogarth, who was no friend of the Doctor's, immediately afterwards produced a sketch in which the said son was grotesquely represented with a telescope passed through him, in a slanting direction, and through which the Doctor was exhibited, gazing with profound attention at the classics, arranged upon a distant shelf. Now, it would almost appear to me that my hon. friend must have looked at his law books through a medium of the same sort, and that the said law books must have been at all times not merely upon a shelf, but upon a very high shelf indeed, and one almost, if not altogether, inaccessible. However, we have had one or two taken down. Lord Coke has been introduced, as has also Sir George Croke. Every man, as Bacon says, owes a debt to his profession! And no lawyer could feel pleasure in detracting from the fame of Coke. It will be cheerfully admitted that the sturdiness of his conduct when Chief Justice, as evinced in his communications with

King James, effaces, in some degree, our feelings of disgust at the brutal, bull-dog ferocity with which, in the preceding reign, he baited Raleigh at the bar. But what sort of doctrine did Lord Coke lay down? Why, that the judges ought not to give opinions in cases between party and party. But will it be said that the judges of England cannot be constitutionally consulted upon points of general constitutional law? If that be said, I say that that is not the law so far as I know anything about it. I hold in my hand the work of a writer of some celebrity in his day, and who is occasionally talked of even yet; but one who, I suppose, must hide his diminished head in the presence of the "Jurist," a three-penny weekly publication, got up by some briefless barristers in London. The writer is Blackstone, and the work is his Commentaries on the Law of England. Blackstone expressly says, in speaking of the various Councils of the King, that a third Council, belonging to the King are, his judges of the courts of law, for law matters; and again, that *when*, in the books the King's Council is spoken of, then, if the subject be of a legal nature, by the King's Council is understood his Council for matters of law, namely, his judges. Now, when the question is not, whether the reasoning of the judges is good or bad;—but whether they had any right constitutionally to be heard at all—when they are held up to reprobation, not for what they have said, but for having said anything—when there is an attempt to get up a hub-bub and hue and cry of unconstitutional interference, I have a right to read the calm constitutional remarks of this great authority, in order to show the light in which he viewed the principle involved. But what more extra-judicial acts of the judges have we? Do not the twelve judges of England—I beg pardon, Sir, I believe I should say the fifteen judges (like Lord Coke, who concludes that because there were twelve tribes, and twelve apostles, so there should be twelve judges, I am partial to the ancient number)—but do not, I say, the judges of England sit in the House of Lords? Why although it may not be so generally known, the legal reason why judges cannot sit in the House of Commons is because they do sit in the House of Lords. And what do the judges sit there for?—to show their wigs?—to sport their

ermine ? No, Sir, they sit there as the solemn advisers of the House, to assist the Peers upon all point of law. Their lordships will not call upon them to do what is indelicate or to give their opinions in cases between party and party ; but even beyond this boundary, see how large a field is of necessity left open, by the variety of matters which arise before the House, as well in its legislative as in its judicial capacity. Take even one part of the law of England—the law of evidence—and see how much of that is composed of the resolutions of the judges delivered in the course of the most memorable case that, perhaps, ever occupied the attention of the world—I mean the case of the bill of pains and penalties against Queen Caroline. With such a case—with such a bar—with such an auditory—every point was raised which ingenuity could devise, and every point was by the lords referred to the judges, who retired and consulted together upon the subject. Now he will be a better reasoner than I pretend to be who sees the difference in principle between the English and unquestionably constitutional proceedings, of judges acting as the law advisers of the House of Lords, and the judges of this colony giving, under the circumstances in which they were placed, an opinion upon the constitution of this Council. But let us come to this Council itself, and ask, can it consistently uplift its voice against opinions expressed by the judges out of court ? Are we to be frightened by this solitary squib of yesterday, when we have been calmly sitting upon gunpowder for years ? We refer to the judges every bill for report. They are called upon to say whether, if passed into a law, that bill would work in the colonial courts. Now mark the consequences of this system, as bearing upon declamation about extra-judicial opinions. I bring in a bill, and, being a bungler, I bring in a bad one. But it passes the Council, and is referred to the judges. The judges, for some reason or other, or for no reason at all, return “no impediment,” and duly certify to that effect. The law goes forth ; and some great lawyer like my hon. friend, finds that there is an impediment which was completely overlooked. This is a point which the judges must in court decide. Now will any man tell me, or tell this Council, or tell the public, that there will not be as much pre-occupation of mind, and as great a dis-

position to resist the force of reasoning and the soundest analogies of law, on the part of functionaries who have certified that there was no impediment to the working of the law which was then upon its trial, as could be supposed to exist under any conceivable circumstances whatever? I put it fearlessly to any man of common sense to say whether any danger can reasonably be apprehended from the giving of such an opinion as the judges have done upon this occasion, which does not exist in an equal degree with respect to every bill referred to them. I may mistake the applicability of these remarks; but if I understand the force of them, they go pretty far, I think, to dispose of one objection which has been so strenuously urged against the judges' letter. Then, there arises a completely distinct question—one, which having discussed before, I shall not now enter upon at any length;—I mean, as to whether the judges, in writing to your Excellency, took a proper course of expressing opinions which they had a right to form and, which, subject, of course, to the force of argument, they had an equal right to retain. I threw out, the other day, that several ways were open to them;—that they might have written to the newspapers, or placarded the walls, or communicated with the chairman of the impeached committee. But I thought then, and I think now, that it would be hard to show that they were not at liberty to send their explanation to your Excellency, leaving it to you to make such use of it as you might think proper. Your Excellency as Governor, has a necessary authority over all officials, the judges not excluded. For what appears to you sufficient reason, you may suspend any of the judges. Does not this circumstance alone seem to establish a sort of connection between your Excellency and the judges, which does not exist between the judges and any other authority in the colony, and point you out as the fittest quarter to which the judges can address themselves when desirous to explain any act of theirs which appears to require explanation? For ought that any one could tell, your Excellency might have considered the refusal of the judges to give evidence before the Robben Island committee, a good ground for suspension. To your Excellency, therefore, it seemed peculiarly fitting that the judges should state

their reasons for so refusing, involving, as those reasons chanced to do, a review of the powers, privileges, and functions of this Council. The letter addressed to your Excellency, under those circumstances, in the exercise of your discretion you submitted for the consideration of the Council ; and the nature of the debate which it has elicited, sufficiently shows that it was an instrument which you could not with propriety have put into your pocket. We are now brought round again, Sir, to the consideration of that letter, and of the soundness or unsoundness of the statements which it contains. The hon. member on my left (Mr. Ebden) is correct in stating that the greater part of the observations which I submitted to the Council on the last day of meeting, were directed against what were then understood to be the opinions of the judges. Since that occasion, however, I have had several conversations, I might almost say discussions, upon the subject of the real meaning of the judges ; and having thus been led to "enter anew into a careful examination" of their letter, I am of opinion "after deliberate reconsideration"—(I cannot do better than adopt the language of the letter) that there is nothing in what the judges have written which is not quite consistent with the only meaning which I am assured they intended to convey. I will not go as far as to say, Sir, that in my humble judgment an ordinary reader would not have understood them as going considerably farther than it seems they ever meant to proceed. But I may now state—and in so doing I speak with some degree of authority—that the judges never meant to lay down, and do not wish to be understood as laying down, anything more than two simple propositions : First, that by your Excellency's commission, the Royal instructions, and the rules of this Council, there is no power vested in the Council, or in any conceivable committee of the Council, to claim, as matter of legal obligation, the attendance of witnesses whose evidence they may wish to take ; and, secondly, that even admitting that this Council had such a power, and that every committee upon a bill had also such a power, yet that this committee of inquiry upon Robben Island would not have the same power, by reason that such committee of inquiry is not expressly authorised by any of the instruments

creating the constitution of this Council. Upon this subject, Sir, I shall take advantage of some views which have been committed to writing by an acute and intelligent friend who is better acquainted than I am with what the judges really meant ; — they are as follows :

“It has been admitted, and is now undisputed, that the committee designated in Mr. Ebdén’s letter to the judges as “the committee of the Legislative Council appointed to inquire into the convict establishment at Robben Island is not *the Legislative Council in committee, but a committee appointed by the Legislative Council* to inquire into the convict establishment at Robben Island.”

“The judges are of opinion that as the instruments creating the Council and establishing its constitution, do not prohibit the Council from appointing committees of its members for the purpose of procuring or endeavouring to procure, information on any subject, that therefore (as already expressly stated in the seventeenth paragraph of their letter), it is neither unlawful nor unconstitutional for the Legislative Council to *appoint any number* of its members who may consent to act, a committee to procure or endeavour to procure for the Council information on any subject,—and to make inquiry for that purpose,—and as neither the instruments creating the Council and establishing its constitution, nor the standing rules and orders duly framed by the Governor and Council “for maintaining order and method in the dispatch of business in the Legislative Council,” prescribe any number of members as the *quorum* of which any such committee so appointed as aforesaid must consist in order to entitle it to act, or prescribe by whom any such committee shall be presided over, that it is neither unlawful nor unconstitutional for the Legislative Council to fix what number of members of any such committee shall be a quorum, or to appoint or empower such committee to appoint any of its members, whether official or unofficial, senior or junior, to be its chairman ; and therefore that it was neither unconstitutional nor unlawful for the Legislative Council to appoint the committee referred to in Mr. Ebdén’s letter to the judges, a committee to inquire into the convict establishment of Robben Island, and procure or endeavour to procure information for the

Council on that subject, or to appoint any number of the members to be the quorum, or to empower this committee to elect its own chairman ; and that such committee, so appointed, might lawfully assemble and meet under the presidency of the member whom the committee had elected to be their chairman, and might lawfully make inquiries as to the state of the convict establishment of Robben Island, and procure or endeavour to procure for the Council information on that subject,—and report the same to the Council.”

“ But the judges are of opinion, as the instruments creating the Council, and establishing its constitution, have not expressly given to the Legislative Council the power to appoint any committee for any such purpose, that therefore, as already expressly stated in the seventeenth paragraph of their letter, the Legislative Council could neither expressly or tacitly delegate to the said committee so appointed, any of its powers, privileges, or functions,—nor could authorize or empower such committee in any way or to any extent, to represent the Legislative Council,—and that no resolution, order, or proceeding, of any such committee, would be binding on any person, or of any force or effect against any person ; and consequently, although the Legislative Council had had (which the judges deny that it had) given to it by the instruments creating it and establishing its constitution, the power of compelling any person to give or furnish to the Council any evidence or information, and of imposing or inflicting any penalty or punishment on any person who should refuse to attend upon the Council, or to give or furnish to the Council any evidence or information, that the Legislative Council could not expressly or tacitly delegate this power to the said committee or authorize, or empower, or enable the said committee to represent the Legislative Council in the exercise of this power, and therefore no resolution or order made by the said committee requiring the attendance of any person before them to give evidence, or requiring any person to give or furnish to the committee evidence or information in any other way, would be binding on that person,—and that no proceeding taken by the said committee for the purpose of compelling any person to attend, or to

give or furnish evidence or information to the Council, or of imposing or inflicting any penalty or punishment on any person refusing to comply with such resolution or order, would be of any force or effect against such person."

Your Excellency will perceive that this statement is reducible to the two propositions, to which I remarked that the judges wished their meaning to be limited; and it will be observed, with regard to these two propositions, that they are widely different in practical importance. The first, which alleges that the Council has not a right to do a certain thing, is clear. It does not seem to be disputed by anybody. My hon. and learned friend (Mr. Cloete) states it as strongly as the judges state it. But it is growing metaphysical—it savours of refinement—and seems to be travelling out of the record, to say that even if the Council could do the thing which it cannot, the Robben Island committee would still be incompetent. "Your *if*," says Shakspeare, "is your only peacemaker." But your *if* upon the present occasion, has proved no peacemaker at all. It served as the introduction of a merely speculative question, which it does not appear important to have agitated, even if the judge's reasoning upon the subject were perfectly indisputable. Now I certainly did consider, when I last addressed the Council, that the judges meant what I have to-day explained, and something more besides; and I have committed roughly here to paper the principal points which I, in common, I believe, with most other people, understood them as conveying.

1. That a new and deliberate reconsideration of the constitution of the Legislative Council had, in some way or other, led the judges to take clearer views of the subject, upon the present occasion, than they might have done previously; and that they now saw some things differently from what they did before.

2. That the judges now considered that the Council, either designedly or in error, had upon some previous occasions, so numerous as to amount to a practice, acted in some way or other, relative to the creation or appointment of committees in a manner unconstitutional and unlawful.

3. That the unconstitutional and unlawful practice last referred to was made up of cases in which committees of a like nature with that now sitting upon the convict establishment of Robben Island had been created, which said Robben Island committee was consequently itself an unconstitutional and unlawful committee, when considered with reference to the character which it was meant to possess.

4. That the Council is not, by its constitution, authorised, empowered, or legally entitled to do any act as a Council, which act it is not *expressly* authorised or permitted to do by the Royal Commission, by the Royal instructions, or by its own standing rules.

5. That to nominate, appoint, or in any way create any committee, except a committee upon a bill, as expressly authorised by the standing rules, in an act which the Council, acting as such, could not legally do, because that act is not an act expressly authorised by the Royal Commission, or by the Royal instructions, or by its own rules.

6. That the Robben Island committee falls under the principle last laid down, and that the appointment of it by the Legislative Council, acting as such, was an unconstitutional and unlawful act.

7. That while it is neither *unlawful* nor *unconstitutional* for the Council to ask any number of its own members, or of strangers, to form themselves into a committee of inquiry, and to favour the Council with the result of any inquiries which they may have it in their power to make upon any given subject—yet that such a committee, whether composed of members or of strangers, was not considered by the judges to be, in any proper sense, a committee of the Legislative Council, or a committee which the Legislative Council, acting as such, had any authority expressly, or at all, given to it, by the Royal Commission or the Royal instructions, or by its own rules, to appoint; and, consequently as the right to make such appointment would be either a “power,” a “privilege,” or a “function,” the Legislative Council, acting as such, had no right so to do; that such a body of persons had no constitutional or legal right to be recognised in a collective capacity as a committee of the Council; but were a mere voluntary association of individuals,

and to be only regarded as such. That the Legislative Council might popularly be said to resolve to form a committee to inquire together, in the same sense in which they might resolve to form a party to dine together ; that as the inquiring together and the dining together must both be, in the strictest sense, voluntary and independent acts upon the part of those who choose either to inquire or to dine, the term "*appointed by the Legislative Council*," applied to either case, would be used with some degree of laxity,—seeing, moreover, that in the case of the committee (contrary to the general principle of committees appointed by public bodies, for the performance of a certain duty) as well as in the act of dining together, the parties assembled in no way represent the Council, or partake of its character, or perform any function contemplated by law."

I certainly did consider, Sir, that the views which I have here given were deducible from the judges' letter. It is merely a question of construction, and I take it for granted that I have been in error. But, either the letter is not very well written, or else I have read it very ill ; or, perhaps, the truth may lie between. As matters stand, it may be considered, I imagine, that no questions of practical importance are now contested, save some which will be found to lurk under the general term "delegation." The judges say, I think, that the Legislative Council may appoint all manner of committees for all manner of purposes, but that it can delegate none of its powers, privileges, or functions. Let us see what is the meaning of this, and what consequences follow from it. We will begin with the delegation of powers. The power, for example, to make laws is the primary power of this Council. Could the Council delegate to a committee this power of making laws ? I apprehend that the reason of the thing, the construction of the written instruments, and the analogy of the House of Commons, will all combine to show that this power is not one which can be delegated by the Council to a committee. But, assuming that the duties of the Council are not confined to the making of laws, but extend also to the making of inquiry into matters of public concern,—then the ques-

tion will arise, whether the reason of the thing, the construction of the written instruments, and the analogy of the House of Commons, do not, in this instance, support, instead of opposing, the idea of delegation as it regards a committee of inquiry appointed by the Council. Come now to the delegation of privileges. Freedom of debate is a privilege of this Council. What freedom of debate means has never, I fancy, received a judicial determination. It may mean one of two things, or it may mean both of them. It may mean that your Excellency, sitting here, shall allow us freely to express our sentiments, or it may mean that words spoken here, affecting third parties, shall not be actionable, or, as my own opinion is, it may mean both. Taking this to be the proper meaning of the term "freedom of debate," as applied to the Council, would the Robben Island committee have the same freedom? True, the judges say that that committee is not illegal, and that its chairman is not illegal, and that its proceedings are not illegal. But to say that it is not illegal is not to say that it is privileged; and I apprehend that upon the reasoning of the judges, it would follow that our debates in the Robben Island Committee are clothed with no protection whatever. In other words, the judges will hold that the privilege of freedom of debate, like the power of law-making, cannot be delegated by the Council to a committee. Upon the other hand, the question seems to be viewed somewhat in this way:—the power of legislating almost implies a power of inquiring, and, at all events, a power of inquiring is supposed to be conferred by the Royal instructions. Under these circumstances, the practice of all deliberative bodies, and the peculiar nature of the thing to be done, point to committees of inquiry as the obvious and proper mode in which the Council can perform this part of its functions; and therefore it must be taken that the privilege of freedom of debate as much extends to such committees as it does to the Council itself. Of the delegation of "functions," I shall not stop to speak, because I apprehend that the word is almost synonymous with "powers," and that the observations which apply to the delegation of the one will also apply to the delegation of the other. But from what I

have thus thrown out, it will appear that there are still some questions open for discussion, which it would be very important to have satisfactorily set at rest. For this purpose, I am for sending home the judges' letter together with the resolutions as submitted by my hon. and learned friend. It appears to me that we are not in a position to affirm everything that is stated in those resolutions—although, for my own part, with the exception of some hard words, which my hon. and learned friend, however, cannot be blamed for using, there are very few things in these resolutions from which I should feel inclined to dissent. The judges, if they should wish to show the Secretary of State in what particulars they have been misunderstood or misrepresented, will, I presume, be entitled to do so through your Excellency. In the meantime, it appears to me that the most convenient course which the Council can adopt, will be to transmit the two opposing statements for the consideration of Her Majesty's Government, and to request such directions may appear to be required. With regard to the resolutions which have been moved to-day by the hon. member on my left, it appears to me that the Council could accomplish no useful purpose by attaching them as riders to those previously submitted. Their mover will, of course, be entitled to send home both his resolutions and his reasons, which gives him every fair play. But, as it appears to me that the resolutions of my hon. and learned friend entirely exhaust the subject, as the intended riders breathe a tone with which I have no sympathy, and as they add nothing either to the symmetry or the strength of those by which they were preceded, I confine myself to moving that the letter of the judges and the resolutions of Mr. Cloete founded thereupon, be transmitted to Lord Stanley.

ON CONCEALMENT OF BIRTH AT
MISSIONARY INSTITUTIONS.

[*Criminal Sessions, Cape Town, October 20, 1842*].

In re ELIZABETH AUGUST.

THE ATTORNEY-GENERAL, in summing up, observed at some length upon the evidence ; and called the attention of the jury as to the proof which went to shew that the child had been born alive ; that it had met its death by violence ; that the violence was the act of the prisoner ; and that, at the time when she offered it, she must have in such a state of mind as to be accountable for her actions. After remarking upon the preceding and some other points, the learned gentleman said :—I have now, I think, touched upon the most important portions of the evidence produced in this distressing case. The weight to be attached to that evidence is a question entirely for you. If you have a reasonable doubt, give the prisoner the benefit of it, and send her away with the Scriptural injunction,—“ Go and sin no more.” But if you have, and can have, no shadow of doubt whatever ; if you are thoroughly satisfied in your minds and consciences that this unhappy female, in order to conceal an immorality which would have led to her ignominious expulsion from the missionary institution in which she resided, hardened her heart against her innocent offspring, and put her new-born infant to death,—then, gentlemen, you will do your duty, and find the prisoner guilty. And here, gentlemen, considering the circumstances of this case, and the situation which I hold, I cannot deem it either unnecessary or improper to say a word or two with reference to that rule of the missionary institutions by which the prisoner’s crime appears to me to have been prompted, and which has been proved in court to-day. Gentlemen, for the zealous and devoted men who give their lives and labours to missionary exertion, I entertain the most unfeigned respect. And

if, where all are excellent, I were still obliged to give a preference, I should be disposed to say that no class of Christian missionaries are more nobly distinguished by their efforts to benefit their species than the Moravian brethren. Under their primitive and apostolic teachings their disciples learn to combine the active performance of the duties of this life with the most fervent aspirations after another and a better,—and two things sometimes separated are harmoniously reconciled ; I mean the doing with cheerful alacrity whatever the hand findeth to do, and, at the same time, the devoting of the heart to those higher objects which it is the great aim of missionary zeal to keep in view. Entertaining these sentiments, gentlemen, I am not likely to speak disparagingly of the arrangements of any Moravian institution, and if the rules now under our consideration have elicited any harsh or condemnatory remarks elsewhere in reference to such a case as that now before this court,—I should best consult my own feelings by standing here as the apologist of the missionaries rather than their censor. But I do feel that those good men have laid down a rule which, considering the circumstances of the coloured population of this colony, may, unless accompanied by the greatest care, produce much evil. It sounds well, in one point of view, to say that the chastity of young women is guarded by a regulation which subjects to the shame and suffering of public expulsion any unmarried female who becomes a mother. But, in another point of view, such a regulation works dangerously. Infanticide, gentlemen, ought, one would say, to be a crime unknown to the lower classes in this colony. None of the usual temptations to its commission exist here. These temptations, so far as I am acquainted with the subject, are chiefly two. When population is dense,—means of subsistence scanty,—and mothers must starve themselves if they are to rear their children, all the natural affections are stifled by the pressure of physical want, and multitudes of infants perish without pity. Such are the wholesale slaughters of Hindostan and China. In other and very different circumstances, a regard to reputation will be found to instigate the murder of illegitimate children. In countries where the moral and religious tone of society is high, where the female

who loses caste and character loses everything, it is sometimes found that the perversion of a fine principle will urge to the perpetration of the foulest of crimes, and that the frail mother does not shrink from embruining her hands in her infant's blood. In Scotland (at least at one time) I believe this principle has not been unknown, and in the North of Ireland I have had occasion to witness the operation of it in the course of my own professional experience. But in this colony there is no want of such a nature as to stimulate to child murder. Nor, amongst our lower classes, generally, does there exist any such stern severity of moral judgment in regard to female frailty as might lead a woman to commit a fearful crime merely to conceal the loss of character. At the missionary institutions, however, there is a strong fear of expulsion, and the prisoner at the bar is not the first miserable creature who has yielded to that fear. Gentlemen, it appears to me that there is a peculiarity connected with the operation of such a rule as that to which I have alluded, which is not unworthy of being noticed. If that rule were the natural growth of moral and religious feeling amongst the coloured class itself; if it were merely the general sentiment taking spontaneously a certain shape, it would, in all probability, be attended with comparatively few dangers. No doubt, as I have already said, female honour cannot be very greatly prized without the risk that some females will commit great crimes for the purpose of concealing the evidence that they have lost it. But where the social law which punishes female immorality is only the natural and unforced result of sentiments and principles which dwell deep in the heart of that society itself, that law will be, to a great degree, its own preservative; for woman, in such circumstances, will be strongly fortified by sentiment and principle against the original temptation, and even if she chance to fall, her mind and moral feeling are too well disciplined to allow her to incur the sin of murder rather than the shame of exposure. But is the rule of the missionary institutions a rule of this description? Is it not a law imposed upon the people by their spiritual superiors, instead of being a law created by the people for themselves? And does it not come to pass that females of infirm principles and half

formed notions of right and wrong, confound all the boundaries of criminality, and, in their darkened imaginations, are found to fear the frown of the missionary and expulsion from the institution more than the guilt of murdering their offspring? Do I therefore denounce the rule as vicious? Gentlemen, I will not take upon me to do so. I am too well aware of the reasons which may be adduced in its support; of the impolicy of relaxing any moral law, merely because immoral practices are prevalent; of the impossibility of ever raising the standard of sentiment and feeling except by the erection of a stern and unbending code of discipline; of the probability that the evil attendant upon the standing up, at once, against immorality, will prove short lived and inconsiderable, whilst the evil of giving place to immorality may generally be expected to prove permanent and immense;—of the chance that very few children will be murdered by the rule, whilst owing to it, very many females may be preserved from falling. Feeling the force of these and similar considerations, I should be slow to say that the rule in question is a bad rule, and one which ought to be rescinded. But if my voice could reach the respected persons who have the management of those missionary institutions, and if the venerable gentleman who was examined here to-day, and who, I see, is still in court, could understand the tongue in which I speak [Mr. Lehman spoke only Dutch], I would say to each of them, as I would say to him,—“Sir, I sympathize with you, and respect you. To your institutions and their objects, I give all honour. I acknowledge that this rule of yours, however it may prove an unintended snare to some of your people,—was framed by men who feared God, and whose only object was to enforce his laws. If your conscience calls for its continuance, let it continue. But if it is to continue you are bound to exert every energy to prevent it from producing the evil which we see that it has a tendency to produce. You have great power. This very case proves that you have great power. It seems very strange, but it is true, that the conscience of this miserable girl appeared to have been much more affected by her having told a falsehood to the missionary about the death

of her child, than by the barbarous deed which caused that death. Use then, your power, I beseech you, to organize in your institutions such a religious police (if I may use the term) as no art can 'baffle. Let every matron, let every father and every mother, be employed by you to keep anxious watch and ward over the young. Establish such a system of continual though delicate inspection, as will effectually prevent the possibility of any female under your care proceeding through the various stages of pregnancy unnoticed and unknown. By this means you may render the working of your rule safe and salutary, and save the shedding of innocent blood." Gentlemen, it is possible that such surveillance as I have been speaking of may, even now, exist——

CHIEF JUSTICE :—It clearly did not exist in respect of the prisoner.

ATTORNEY-GENERAL :—Unhappily, my lord, it would appear that it did not. But, however that may be, I have thrown out these remarks in the hope of calling the attention of the respectable and respected men who have the charge of these institutions to what is certainly an important subject. They will themselves discern the obligation under which they are placed to prevent, if they can, a rule which is probably wise, and which is certainly well meant, from producing such disastrous results as those which have conducted the unhappy prisoner at the bar to the place at which she now stands awaiting the verdict which you are empannelled to pronounce.

The learned gentlemen concluded by again telling the jury that if they could entertain a rational doubt upon the case, it was their duty to acquit the prisoner.

ON THE HARD ROAD ACROSS THE CAPE FLATS.

[*Legislative Council, December 19, 1842.*]

The ATTORNEY-GENERAL said :—All the petitions which have been, either spontaneously or otherwise, got up in connexion with this Bill having been now presented, it appears to me to be convenient that I should offer to your Excellency and the Council some observations of a general nature upon the principles involved in the present measure, as compared with the principles upon which certain of the petitioners have based their opposition. It is necessary, for the purpose of being in order, that I should speak to some motion ; and under our rules as they stand, I conceive that the only motion which it is now competent for me to make is a motion for some amendment in this Bill. [The Attorney-General here read the 15th and 17th rules of Council, and proceeded.] Pursuing, Sir, the course (not the most convenient one, perhaps), which the rules would seem to have marked out, I shall move an amendment. It is one of a merely formal nature. The substance of the 6th section in the draft being again repeated, through inadvertence, in section 10, I shall move that the former section be expunged, and proceed at once to make those general remarks which seem to me to be required. Allow me, then, in the first place, to remind the Council of what I stated when originally introducing the Bill,—that the matter rests upon my own individual responsibility as a member of this Council ; that it is in no way whatever a Government measure,—that its fate depends upon its own intrinsic merits, and upon those alone ; and that it is only so far as those merits may justly claim the conscientious vote of any member, that that member can be expected to give this Bill support. But even under these circumstances, I was for some time (down, indeed to a considerable period after the publication of the draft), of opinion that my duty this day would have been very

easily discharged. I had always found that when Bills were brought in of which the usefulness was evident, no defence of their provisions was ever deemed necessary on the part of the proposers, who would have felt that they were consuming time and affronting reason by entering into an elaborate demonstration of that which no body denied. I had fallen into the error of supposing that the 19th of December, 1842, was a day too late for discussing such a question as whether a good hard road along the whole line from Cape Town to Graham's Town was or was not a desirable thing ; whether it was or was not an advantage both to town and country to take the first great step onwards improving the roads belonging to the great corn districts, by laying down, as it were, a grand trunk to which branch roads might by afterwards attached ; whether or not the natural and inevitable tendency of such a road would be to give an impulse to industry,—to a certain extent to annihilate time and space, and raise the value of property,—and whether in fact it would be possible to invent, for this colony or any other country,—the idea of any road whatever, which, from the obvious advantages to be derived from its construction, might be expected to command a greater measure of support. Such general considerations sufficiently convinced me. But they have not, it would seem, convinced the parties whose petitions have been read to-day, and, which we heard with that attention to which the petitions of the colonists are at all times entitled. Those petitions are signed, if I correctly caught the number from my honourable and learned friend who calculated it Mr. Cloete), by some 1,200 persons, and they pray the Council to reject this Bill. How, exactly, the signatures to those petitions have, in all instances, been obtained, it is not for me to say, but if the Municipality of Stellenbosch are right in their assertion, those petitions can scarcely be taken to express the unbiassed and intelligent opinions of many of the persons whose names they bear. I have no right to pronounce that those petitions have been assiduously hawked about the country, and that ignorant people have been misled as to the real nature of the measure in question,—though I do believe that such has been the case ; but I may, I think, with confidence assert, that no signature is to be

found attached to any of the petitions in favour of the Bill which was not affixed spontaneously and willingly. This, however, is not all. Between the petitioners for the Bill, and the petitioners against the Bill, there is another great distinction. The petitioners in favour of the Bill ask for leave to pay their money; and the petitioners against the Bill ask that they may not be called upon to do so; and who does not see that while no man will ever ask for leave to pay money unless he well knows why, many and many a man will resist everything in the shape of an assessment without being able to render any good or valid reason whatsoever? Take the case of a man not particularly brilliant or far-sighted; and one who sees that an immediate demand, however trifling, is meditated to be made upon his purse, and he will easily be led to put his name to petitions, involving principles which, if the subject were fully explained to and understood by him, he would be ashamed to support. But in what light, Sir, are we to view petitions? If we are here merely to add up the number of names attached to certain pieces of paper, and to register the result by voting with the greater number, the sooner such a miserable mockery of legislation as this Council would present is consigned to the tomb of all the Capulets the better. But you cannot degrade yourselves so far as to receive the *dicta* of ignorance or miscalculating selfishness, and to decide, by the short, arithmetical, operation of counting the names of your petitioners, whether any given measure is good or bad. This Council is not prepared, I hope, to act upon this principle, but even if it were, I entertain grave doubts, indeed, whether, if every petitioner who has signed against this bill were here to-day, and were fairly interrogated with respect to the grounds and influences under which he acted, the result might not lead to reduce materially the number of signatures which have now been marshalled in opposition to the measure. Be that, however, as it may, one principle is clear, namely, that to improve the means of internal communication by the construction of roads, and to provide for the expense of so doing by an equitable assessment of property, is one of the most constitutional and the most expedient branches of Legislative power; and although every man, and every woman, and every child in the

two districts of the Cape and Stellenbosch should oppose the measure, yet still, if this Council (I put an impossible case, but no matter) still, I say, if this Council, giving due weight to argument—deliberating upon the inconvenience of going against the pronounced opinion of the public—taking into account the existence of prejudice (for even prejudices are not to be overlooked in politics) should, after all, come to the calm and deliberate conclusion that the general good required the enactment of this ordinance, then it would be the duty of this Council to consult the general good, and to enact this ordinance, and not to submit their understandings to any blind, unreasoning opposition. To me it appears that the petitions in favour of this bill consult the general good, and that the other petitions which have been presented oppose the general good. To me it appears that some of the principles laid down in the petitions against this bill are unsound,—are lamentably unsound,—are principles which, if carried out to the entire of their darkening extent, would extinguish this end of the colony altogether. But let me, here, be just. The petitions read to-day are not all of the same nature, nor do they all stand upon the same footing. You have, in fact, Sir, two classes of petitioners, both of whom object to the present bill; but who object upon grounds altogether distinct, and upon grounds which require to be accurately discriminated, and weighed with very different care. One large class of petitioners advance the bold and broad proposition that soft roads are better than hard roads,—or rather that roads partly hard and partly soft are the *ne plus ultra* of all thoroughfares. They would not have anything but soft sand though they were to have it for nothing. Were an angel from heaven to descend and make a hard road, without any money at all, those petitioners could not be persuaded but that he was an emissary from below, so mischievous would they deem the work he did. Were a hard road to be made by magic (which is not likely, for conjurors are scarce in this colony, particularly in the rural districts) it would ruin the farmers utterly. Such are the views of many of your petitions. But there is another class of petitioners who must not, I admit, be confounded with the last. Their language is, “We

don't agree with these people whose heads are as soft as the roads they prize, or think that good roads are not a great blessing. We wish a hard road to be made, but we object to the manner in which you propose to raise the means of making it." Now I quite understand this position, and am quite willing to consider it calmly and respectfully, and before I sit down I shall explain the extent to which I am disposed to modify this bill in accordance with some suggestions which have been made. But both classes of objections are now before the Council, and upon both the Council must decide. With regard to the first, I protest, sir, I shall not argue it. I believe that it is an objection by which some of those who were the earliest, and who have since been the most active, in opposing this bill would be a little startled. In a speech delivered by my learned friend, Mr. Brand, at the public meeting lately held at the Commercial Exchange, he reviews the history of the question. He says that in 1837 Dr. O'Flinn and Mr. Faure were deputed, by whom? he asks—"Why, by a set of those so-called ignorant Dutch farmers, to endeavour to raise a fund for establishing a hard road." He says, that in that same year, 1837, a public meeting was held in the same room in which he then was speaking, and resolutions, asserting the propriety of making a hard road over the Flats were unanimously adopted. He says, that in 1839 the question was again mooted by the Agricultural Society, when the same unanimous and enthusiastic feeling was again exhibited. Now, I say, that under these circumstances, this objection to the principle of a hard road comes suspiciously late. I say, that under those circumstances, I doubt its absolute sincerity. Why? Because, though the measure was before the public, and under discussion for five years, it is not until a practical mode of carrying out the end in view is brought forward, and parties are called upon to contribute something towards its accomplishment, that any murmur of opposition is heard. And I have no doubt whatever, that if, at the meeting where Mr. Brand made these statements, any one had ventured to assert that the farmers of this end of the colony were senseless enough to prefer a miserable soft road to a good sound hard one, my learned friend, who feels himself to be the constituted champion and literary

organ of the parties so alluded to, would have indignantly denied the charge, and denounced it as a calumny. And if we once go along with these people, where are we to stop? Good God! they talk about the feet of oxen! I am no agriculturist. I can neither form nor offer any opinion as to the species of animal best suited to the circumstances of this colony, and most serviceable as an instrument of transport. But this, I think, I may safely say, that no country has ever much advanced in the career of civilization, or agricultural success, in which the ox has continued to be the main dependence of the farmer, and the almost exclusive means of conveying his produce to its destined market. It may be that no other beast would suit this colony at present. I will not enter upon that question. Neither will I enter into any consideration of the soundness of the calculations made by some of the petitioners respecting the first cost of the horse and the mule; the expense of iron for shoeing them, and the difficulty of supplying them with provender. I know, indeed, that intelligent men entertain doubts upon this head, and looking at the comparative activity, ability to endure fatigue, probable length of service, and, when properly managed, facility of subsistence of the ox and the mule, are disposed to think that the latter is, in the long run, the cheaper of the two. But I do not deem it necessary to take up any position of that kind. I am quite content to occupy another, from which it will be very difficult to drive me. Is it not monstrous to talk about the mischief of a hard road from this to the Eerste River, when, with the exception of that five-and-twenty miles, every foot of road in the whole colony is hard? The petitioners have stopped short. Why do they not go on and entreat the Council to make a grant of money for the purpose of breaking up the abominable hard roads we have already, and by employing every spade and pickaxe in our power in that enlightened undertaking, consult for our colonial prosperity and welfare? Abolish, first and foremost, that pernicious innovation, the road to Simon's Town! This was a work of the same dangerous nature with that now so vehemently deprecated. And here allow me, Sir, to throw in a word about our friends of Simon's Town. They

are indignant, I find, at being called upon to contribute towards the making of a road which, they say, they cannot use. But if other people had not contributed to the making of a road which they were not to use, where would have been Simon's Town and its petitioners? Other people, it seems, are to make a road for them, and they are to assist in making a road for nobody. The Scotch proverb goes, that "Gif, gaf, makes gude fellows," though the Simon's Town petitioners rather advocate a species of Irish reciprocity, in which all favours are to proceed from one side. However, to return to what I was saying,—let the road to Simon's Town, at any expense, be broken up, and made soft and comfortable. How hateful are those Wynberg omnibuses, running lightly in and out of Cape Town, three or four times a day! The gorge of Drakenstein rises at the sight. By all means let us contrive to get rid of these abominations, and manage to visit Wynberg as seldom as we can, and then proceed in the good old way, in an ox wagon, with the soft sand up to the bellies of the beasts and the 'naves of the wheels! Once make a hard road over the Flats, and who knows what next! Why it will be all alive with travellers and vehicles; and who will venture to secure our respectable petitioners that their eyes may not be blasted by seeing some fine morning or another a Stellenbosch omnibus rolling rapidly along. Dire and disastrous, Sir, are such anticipations; for if, upon a hard road, under any circumstances, men travel to their ruin, let them once put themselves into an omnibus, and they are sure to drive headlong to the devil. Sir, I can pause no longer upon an objection which I have only ventured to ridicule because, in simple truth, it seemed to me unworthy of a serious refutation. But another objection is made of a more reasonable kind. Certain of the petitioners say that their places are considerably removed from the line of the intended road; that the intermediate space which they will still be obliged to travel over is very heavy, and that they will be obliged, in consequence, to employ as many oxen to reach the new road as would have sufficed to drag the wagon through the old one. It is clear, however, that even were matters to continue thus, something would be saved even to those people

in the wear and tear of oxen. But it is clearer still that the effect of this great work would naturally be to promote the improvement of the roads which lead to it. The existence of the great impediment presented by the Cape Downs operates as a bar to all improvement beyond it and around it. Remove this impediment by making a good road, and it will instantly become a matter of importance to see how far it may be practicable to connect branch roads with the great trunk which will then be opened, to make what is good yet better, and (if no facilities for transport can save the wine trade, as I fear they cannot), to open up those inexhaustible corn districts which now support themselves with difficulty against the heavy cost of carriage. But all things are not to be at once accomplished, and to determine to do nothing until you can do every thing, is the sure way to keep matters for ever as they are. Sir, I come now to the second class of objectors, whom I set out by describing. They are for the road, but they are against this bill. Rejoicing to have with me to such an extent their intelligent support, I cannot refrain from reading again one of the resolutions of the Cape Town Municipality, in which the advantages of the proposed road are very correctly estimated and very strongly put. The resolution to which I refer is this,—“That in the opinion of this board the construction of a hard road across the Cape Downs, by diminishing the expense of carriage, and removing one of the great obstacles to the advancement of this colony, will not only have a beneficial tendency by opening free and easy communication with the remote parts of the country, placing, them nearly on a level with those in the neighbourhood of town, and raising their value, in a commercial point of view, but will at the same time render available for other purposes the capital at present sunk in providing for the rude and difficult means of transport, and thus by increasing the quantity of exportable produce, confer a lasting benefit on the community at large.” We have now escaped, Sir, out of darkness. The resolution which I have read enunciates sound truths, and enunciates them well. Upon the principle contained in that resolution I take my stand. Every position laid down by the commissioners is true, and the

last is emphatically so ; for, surely, it does not require that a man should have been employed all his life in in-spanning and out-spanning, to be able to perceive that the necessity of having 18 or 20 oxen, with suitable attendants, in order to drag three leaguers of wine, or 10 muids of wheat, or 2,000 pounds weight of anything, through the only paths by which the Cape Town market can be approached, must involve an enormous, a ruinously enormous, expense, so long as that necessity continues ; and that if a road can be made by which much more produce may be carried in much less time, and with a much smaller number of cattle, an amount of capital and labour will be thereby disengaged which, judiciously applied, may materially increase the productive power of this end of the colony. Here, then, the Cape Town commissioners and the friends of this bill are cordially agreed. But at this point the commissioners fall off from us, and rank themselves with those who object to the means by which the bill proposes to raise the money required for the accomplishment of this great work. The manner in which the bill proposed to raise the necessary funds is simply this, to make the road by means of an assessment upon the owners of immovable property within the two districts, and to maintain the road by means of reasonable tolls to be paid by those who use the road, or for whose use it is provided. The assessment, it is obvious, will be regulated by the amount required for laying down the road. The proceeds of the tolls cannot well be estimated at present, but the bill contains a provision that in case a surplus should arise from that source over and above a reserved fund of a reasonable amount, then all moneys not required for the maintenance of the road should be at the disposal of the colonial legislature, for the time being, and be applicable to the purpose of any work of a public nature, within the two districts of the Cape and Stellenbosch, which might be deemed deserving. It may be that the prospect of any considerable surplus is one which is not likely to be realized. Be it so. Then we throw that consideration overboard, and narrow the principle of this bill to a rate payable by the owners of fixed property, in order to make the road ; and tolls payable by parties using the road in

order to preserve it. Sir, I consider this principle to be a sound principle ; to be the only sound principle—to be, situated as we are, the only principle upon which the work can possibly be done. But I have no abstract fondness for it. On the contrary, there is another which, if it were applicable to our circumstances, I should certainly prefer ; I mean the ordinary principle of turnpike trusts in England. There money is borrowed upon the security of the tolls to be afterwards levied, and when the road is ready, are imposed to keep it in repair—keep down the interest—and ultimately to pay off the mortgages. But no man who hears me considers that the road over the Cape Flats, considering the original expense of making, the annual expense of preserving—and the amount of traffic to be calculated upon—could be formed upon the principle to which I have adverted. It may be questionable whether the tolls will always suffice for the mere maintenance of the road ; but if you add to that the interest of the money expended on its construction, it will clearly be seen that any attempt to carry out our project upon the English plan would tend inevitably to one or other of two results, or, perhaps, to both,—namely, that the whole concern would end in bankruptcy, or that tolls must be imposed so ruinously heavy as to become an intolerable burthen. By the last returns which I have seen, it appears, if I remember rightly, that the expense of maintaining turnpike roads in England averages about £35 per mile per annum. The cost connected with the intended road would probably exceed this rate ; and although I cherish the expectation that, with an active and economical management, making the most of the tolls and the least of the maintenance, the proceeds of the one will be found to cover the outlay for the other, I should, at the same time, regard as utterly chimerical, the notion that upon the mere support of tolls the making of the road could be attempted with any prospect of success. I do not believe that there can exist, upon this subject, any difference of opinion. The road, if to be made at all, must be made by means of an assessment of some sort or other. The assessment proposed by this bill I have already stated, and I shall now run rapidly over the objections made to it,—prepared to

yield everything which can be given up without a sacrifice of principle, and to support what I cannot give up, with what appear to me to be sound reasons. First and foremost, then, it is asserted that none should be assessed to make this road except those who are to use it. This principle is a plain one, and it is not destitute of plausibility. But once apply it steadily and you put an end to all improvement whatsoever. The various subdivisions of gradually increasing extent by which we are surrounded, municipalities, districts, and finally the colony itself, must each in turn be viewed, for certain purposes, as one ; and the various members must bear each other's burthens. Under the system of municipal taxation the man in Kloof-street pays for repairing the street at the toll. It is vain for him to say, " I never use Sir Lowry-street ; I never drive to Rondebosch ; I hate the south-easter and the dust ; I drive to Green Point when I drive at all ; and why should I be taxed for what I don't use ? " The answer is that he belongs to the municipality, and must, therefore, share in the contributions of its members, and that such a principle of exemption once admitted would make all municipal improvement perfectly impracticable. You will also perceive, Sir, that no reasoning will prove that it is unjust to call upon a man to pay a rate for a road which he makes no immediate use of, which will not also prove that every man should pay toll for a road in proportion to the use he makes of it, and that to charge men who scarcely travel farther than the turnpike gate as much as you charge men who travel the whole length of the road, is an injustice. But is this possible ? My hon. and learned friend opposite (Mr. Cloete) lives at Woodstock. He consequently only uses some two or three hundred yards of the Simon's Town road, and yet he is charged at the same rate as I am, who live at Rondebosch ; and I, in turn, pay equally with the visitant to Wynberg, and so on, all along the road. I know of no principle which will justify this inequality except the principle that the general advantage of the public is promoted by the road ; that the neighbourhood, considered as a whole, is made the better by it ; that it is one of the social obligations undertaken by us all to contribute towards objects intended to advance the common good ; and that there is no

practicable mode of arranging those contributions with reference to a nicely graduated scale of individual advantage. This is why my hon. and learned friend pays for the road to Simon's Town ; and this is why the people of Simon's Town should pay for a road to Stellenbosch. To charge tolls at so much a mile is impracticable. To arrange an assessment according to calculated benefit is alike impracticable. The most we can do is to make a general approximation to what, if possible, would be abstract justice. Mr. Brand distinctly admits the propriety of imposing local taxation for local purposes. Upon this point there is, I believe, a pretty general agreement. Then the problem to be solved is this : " What is local taxation ? " " Where are you to draw your lines and fix your boundaries ? " Now, I am far from maintaining that if the colony were not already divided into districts, and if I were sitting down to mark out the limits within which an assessment for making this road should be imposed, I am far, I say, from maintaining that I should have included the Cape and Stellenbosch divisions, exactly as they stand ; on the contrary, I should probably have omitted some quarters which come within those districts, and I should have included some quarters—Caledon for instance—which lie beyond them. But when I find the justice of local taxation for local purposes generally recognized, and find also that a division into districts already exists, and find, moreover, that the road in question will lie within the limits of the Cape and Stellenbosch districts, I deem it the best and wisest course to adopt the limits of those districts for the operation of assessment, and not to attempt the creation of a novel subdivision—a task which no power on earth could satisfactorily perform, and which would be inevitably attended with infinitely more of heartburning, confusion, and annoyance, than can arise from adhering to those long established limits which have created a something like communities, and the inhabitants of which are accustomed to co-operate together. If, then, certain districts are to be assessed, we can make no exceptions. What took place relative to the market dues on wool ? The Government endeavoured to protect that, the great hope of the colony, from the imposition of market dues. We said, " It does not use

your market, and will not use it unless it is forced. It receives no benefit, for unlike cabbages and such matters, it is exclusively for export. Let those articles which enjoy any advantage from your market pay the dues. But wool, confessedly, is not one of these." This was what we said, and, in the long run, we were defeated, because the municipality had a principle in their favour, and we had none. They said that a public market was a public good ; that a public market could not be kept up without market dues, and that, if any one article were allowed to go free, a number of other articles would claim a similar exemption, and the result would be interminable bickering and confusion. Influenced by such considerations, your Excellency, I remember, sooner than your Executive Council, saw the propriety of not insisting further in favour of the wool, and the point was given up. Now, everything that the municipality said then relative to the dues and their market, I can say now, relative to this assessment and this road. But I think there are very few, indeed, throughout the entire of the two districts, who, either by themselves or their connections, will not reap some advantage from this road, and feel that, for their comparatively trifling assessment, they have received an ample equivalent. If they don't get it in meal they will get it in malt. And if, after all, there will still be found a certain number who must pay and who yet receive no benefit, they must only reflect that they are only suffering one of the ills that flesh is heir to, and that as measles, small-pox, smoky chimneys, and scolding wives, are miseries over which it is useless to repine, so is the liability of those who live in a district to district taxation, a misfortune which it is altogether impossible to shun. So much for the general objection advanced against the principle of the bill upon the table. Sir, I come now to another petition written, not by a great unknown, but by a very able and well known pen, that of my friend Mr. Sutherland. He runs, it appears to me, to another extreme. So far from saying that those alone should make the road who are to use it, he lays down a rule precisely opposite, and maintains that the road should be made by means of a general tax to be borne by the entire colony. I shrink from this conclusion ; I do not feel that

I am driven to it. It is true I have argued against a narrow construction which would confine the rate to such an extent as to make it either nugatory or oppressive. But I am not, therefore, obliged to adopt so sweeping a construction as would embrace the whole colony. Equitably to arrange the two opposing principles, is the thing to be done ; and this, I think, the bill has done. For Mr. Sutherland's principle will either do nothing or do injustice. It will do nothing, if each district gets for its own roads its share of the general contribution. It will do injustice if certain districts are compelled to pay for making the roads of other districts. Why on earth should Colesberg or Cradock, where, by the bounty of nature, the natural road is hard and good, be compelled to pay for the roads of the Cape or Stellenbosch ? This I conceive would be injustice ; for surely there is a great difference between saying that, as amongst individuals in a given district, the assessment should be equal, and that, as amongst the different districts, the same equality should be enforced. The frontier cannot properly be called upon to make this Stellenbosch road any more than this end of the colony could be properly called upon to make a road upon the frontier. Sir, running over, with as much celerity as I can, the various projects which have been started as substitutes for the principle of this bill (for by such an exhaustive process alone can the real merits of the bill be adequately weighed), I come to another plan—that, namely, which forms Mr. Sutherland's second proposition—an income tax. He says, "Let this road be made by an income tax. The Governor has £5,000 per annum ; the Attorney-General £1,200 and his practice ; and the Chief Justice rejoices in a sublime £2,000. My spirit is disquieted by the fact that these, and other parties, are to escape taxation, and I desire to have a tax on income in order to reach them." Now I am hostile to this project. Why ? Not because an income tax can never be a just and proper tax, but an income tax can never be a just and proper tax unless it involves in its enforcement a great deal of what, but for its stern necessity, would be felt to be most arbitrary, tyrannical, inquisitorial, and oppressive. By no other machinery can you prevent an income tax from crushing conscientious men

and allowing men without conscience to go free. For my own part, I am determined that any income tax which I support shall be so guarded as to be a tax in reality, and not like our last one, a mere humbug. Is there then, in this case, an adequate necessity to justify the imposition of such a tax as that suggested? Are there bottomless deficiencies to be supplied? Do the finances of the colony require at all hazards to be recruited? How much money do we want? Why, Sir, you want but £30,000. The mention of this sum is itself an answer to the project of an income tax. Connected inseparably as such a tax must be with fraud,—with perjury, —with meanness,—with exposure,—and with many other evils,—I hold that it never can be politic or proper to impose such an impost for raising so small a sum as £30,000. But I maintain, moreover, that every sort of income will not be equally benefited by the road,—that the income from fixed property is that which will be by far the most improved,—and therefore that it is the fixed property of the district which should mainly contribute to form that road by which its value is to be increased. I do not, at the same time, deny that the inhabitants generally will derive some benefit; and although I see no working way in which the inhabitants generally can be brought within the principle of assessment, I may say, perhaps, for one, that hereafter I shall not have the least objection to contribute to the fund the amount of the rate which would be payable upon such fixed property as a person in my circumstances might be expected to possess. But all principle is opposed to the imposition of an income tax for such an object as that now in contemplation. Look at the Municipality,—do they derive their revenue from an income tax? No such thing. They never dreamt of it. Why then should the road to Stellenbosch be made upon a different principle from the streets of Cape Town? Dismissing then, this notion of an income tax, I come to another source of revenue which has been pointed out. The owners of immovable property, it is said, are owners but in name,—the mortgagees have eaten the heart out of the immovable property of these districts, and left the useless carcase with the mortgagors. Make the rich man pay and let the poor man go

free. This sounds plausibly. It has a certain illusive appearance of equity about it, and our natural sympathies are always with the needy rather than with those who seem to take advantage of their need. But weigh the project in the scale of reason, and instantly it kicks the beam. Sir, the mortgagee is in no sense the owner of the mortgaged property. I do not now rely upon the technical principle or refer to the fact that he has not in law the *dominium*. But the mortgagee is a mere lender of money and can with no more propriety be called upon to pay this rate than any other lender of money whatever. No doubt he has the security of the property pledged. But does the additional value which may be conferred upon that pledged property, by making this road, go into his pocket? In the natural course of dealing, clearly not; and if the course of dealing have been such that the mortgaged property will not realize the money lent, is not the mortgagor still, both legally and equitably, bound for the deficiency? And ought he not to bear the weight of an assessment which will tend to make that deficiency less than it would otherwise have been? These, I think, are plain principles, but there is one still plainer, and it is this: Attempt to tax the mortgagee and he will turn round upon the mortgagor, politely requesting him either to pay up the rate, or else to pay up the mortgage money. This obvious consideration appears to have convinced my friend Mr Brand of the uselessness of attempting to force the mortgagees to pay a rate. It is certainly quite enough to convince any one. But desirous, when I can, to fasten upon a principle rather than on a mere expediency, I again repeat that, in my opinion, to force a mortgagee to pay such a rate as that in question would not be just even if it were possible. The municipal commissioners (I rejoice again to lay hold upon their venerable skirts), to their credit be it spoken, say nothing relative to the mortgagees, nor do they desire us to tax parties whom, be it remembered, they do not tax themselves. But the municipality are of opinion that occupiers ought to pay. What sort of occupiers? Let us but understand this point, and we shall, perhaps, agree. Give me an occupier who has a fixed interest enduring after the time at which the road will pro-

bably be completed, and I will tax him in proportion to his term then to come and unexpired. If leases for 999 years were in use here, as they are in Ireland, no man would be so absurd as to argue that the tenant should go free and the rate should fall on the reversioner who must live 999 years before he comes into possession and participates in the improvement. If the more common term of 21 years were known in the colony, I should say that the tenant should make good his fair proportion of the rate. But I protest, with both my hands, against a scheme which would make the rent payable by mere monthly tenants, or by any parties whose interest is determinable before the completion of the road. Will any man stand up and say that it would be just to charge ephemerals of this description? Why the landlord, after the opening of the road, would repair to the tenant and say, "You hold by the month; you have done so for years, and paid the road rate; having done so, it strikes me that you have been here quite long enough; and you will therefore be good enough to accept a notice to quit, unless you consent to pay me so much in the way of increased rent." Now, if you will charge inhabitants simply as inhabitants, I can understand you, although I deny the expediency of such a course. But if you abandon that position, then I say that the man who occupies no house at all, and sleeps in the streets (if any such there be) possesses just as much of a rateable interest as a monthly occupier, or the man who must be out of possession before the road is finished. On this question, however, I am willing to become all things to all if, peradventure, I might gain some. I know of two or three seven-year leases, and I am quite prepared, deducting three years for the making of the road, to charge all such tenants for the surplus, they paying the same proportion of the entire rate which their interest bears to the perpetuity. The Council seems to consider that this would be scarcely worth while; and such is, certainly my own opinion; but if any member deem the charge a proper one, I shall with pleasure make it. But I will never consent that persons who have no fixed interest should be assessed for this road; it would be unjust; and sooner than commit that injustice in obedience to any clamour out of doors, I would see the whole bill torn

into ten thousand fritters. But another suggestion has been made, to which I yield at once. As the draft now stands, no fixed property under £100 in value is to be assessed. I did not exempt such property because I considered that it would be unjust, but because it would be troublesome to collect the rate imposed. I have, however, been informed that a number of small holdings are frequently possessed by a single person from whom the rate could readily be obtained, and, under all the circumstances, I shall, with the concurrence of the Council, abolish a distinction which was, from the first, a surrender of the proper principle to a supposed expediency. The trustees will, in collection, exercise a sound discretion, and never throw good money away in a vain attempt to recover bad. Sir, I was about to say that I had now gone through the whole list of objections preferred against this bill, and of projects proposed to be substituted in its stead. But I must not forget that an appalling consequence of a road rate upon fixed property has been anticipated, to which I have not yet alluded, and, feeling somewhat nervous upon the subject, I shall read from this newspaper, rather than venture to give utterance, in my own words, to the dark anticipation. Here, then, in a letter written by a gentleman whom I have the pleasure of knowing very well, Mr. William Ferdinand Bergh; not volunteering his opinion, but being called forth, and publicly, by the editor of the *Zuid-Afrikaan*,—he draws such a disastrous picture of the results of the intended bill, that, had I seen the awful warning while drawing it, the pen must have fallen from my petrified fingers. “You ask,” he says, “what will be the effect of selling fixed property subject to a road rate? I answer that it can be no other than”—than what? to ruin the whole colony? to cause an earthquake? Human imagination, Sir, sinks dismayed under the effort to realize the full extent of horror; —“it can be no other,” says Mr. William Ferdinand Bergh, “than to cause the stryk-money men to carry their resolutions into effect, of not bidding for the competition money!” (Laughter.) This, Sir, will be indeed a heavy dispensation; and I cannot but express surprise that a matter of so much gravity and importance should only appear to excite the risibility of this Council. For myself, the distressing

event came on me unexpectedly. In considering the question I had never once thought of the stryk-gelders, or considered that the value of all immovable property rested upon their nod. Perhaps my friend Mr. Bergh takes a view too gloomy. Perhaps even without the aid of stryk-money men, fixed property may still bring something; but on this point I speak with diffidence, for, early in my career in this colony, I confounded, in court, a stryk-gelder with a bonus man, and I have never since studied these mysterious subjects with due attention. But if the stryk-money men will take their departure, never to bid for stryk-money again, we can only reflect that they do not take the immovable property of the colony along with them, and that this, at some far future time, may be found to fetch its value, though stryk-geld be then a thing of history, and bonuses known no more. Sir, before sitting down, there are two other topics to which I am anxious to advert. I have been observing, heretofore, upon avowed objections. The matters to which I now allude are considerations which are not avowed, but which, I have reason to believe, are not without their influence. The first of them, Sir, is the exaggerated estimate which has been made of the actual burthen which this Ordinance will impose. I feel convinced that not a little of the opposition which this bill has encountered, has arisen from a notion that the assessment contemplated will be of a most severe and crushing character. A clergyman yesterday mentioned to me that in the course of conversation with one of his people this road chanced to be mentioned, and the party alluded to intimated his intention of signing the petition against this bill. The reason he assigned was, that £15 a year was more than he could afford to pay. Startled at this amount, my informant enquired the value of the objector's fixed property. The other replied £1,000! Now, if such notions relative to the amount of the intended tax are in circulation, I cannot wonder that it should excite alarm. But I have no desire to underrate the pressure, and upon this subject it appears to me that it would not be safe to calculate upon less than an assessment of one halfpenny in the pound upon the value of immovable property, to last, if

necessary, for seven years. To those who reflect that the rateable property in the two districts cannot be estimated at less than two millions and a half, and who consider that the road is calculated to cost from £25,000 to £38,000, the rate which I have now suggested will be deemed sufficient, even if contrary to general expectation it should be out of the power of Government to afford any assistance to this important work. Of course, if the Council should deem it expedient, the maximum of the rate might be lowered, and the number of years increased, so as to make the annual weight still lighter. But it will be obvious that, in order to do the work cheaply, the trustees must be annually supplied with a certain amount of money. If the necessary supplies are not raised within the year, the trustees must borrow upon the security of the future assessments : and borrowing implies a charge for interest, which is itself an augmentation of expense. Were it not for this consideration, coupled with the probability of an additional charge for collection, arising from the fact that no one will collect in the district of the Cape and Stellenbosch £2,500 for the same percentage which he would be willing to accept for collecting £5,000,—the number of years over which the rate might be spread could, perhaps, be increased without material inconvenience. But these are matters with respect to which I am completely in the hands of the Council, and ready to do whatever it deems best. Beyond one halfpenny in the pound for seven years, however, we have no necessity to go, and then the question is, will that assessment prove grievous to the people? I cannot believe it. Behold the Municipality of Cape Town. It has levied last year three farthings in the pound, or £3 2s. 6d. per £1,000, and yet the houses stand ! And matters do not seem to be the worse for it. So far, indeed, from matters being the worse for this assessment, I have no doubt that the value of property in Cape Town is improved by that judicious expenditure, which every one who walks the streets must see, and see with pleasure ; and if fixed property have lately fallen, I do not hesitate to assert that it has fallen, not in consequence of municipal taxation, but in spite of it. If this be the clear and indubitable fact,—if a tax of three farthings in Cape Town has

been borne without murmuring ; if the fact that a tax of an equal amount, or even a greater, may possibly be imposed for ever (and although the Municipal Ordinance will expire in 1860, it may be renewed again, and if the Municipality continue as it has begun, my exclamation with respect to it will be *Esto perpetua!*) has not frightened the owners of immovable property out of their wits,—is it to be said that at most a half-penny in the pound for at most seven years, to be devoted to a work which will change the whole face of the surrounding neighbourhood, is to ruin the town,—ruin the country,—ruin the farmer,—ruin his oxen,—and scatter far and universal desolation ? Sir, the idea is the wildest the mind of man can possibly conceive. I come now to the second of the non-avowed objections (I am wrong in saying unavowed, for I heard with shame, something of the sort in one or two of the petitions which were read to-day), and it is this :—“ We have now, with our vineyards, our gardens, and our farms, a monopoly of the Cape Town market, and we are not such fools as to coax competition from a distance by laying down a road for it to travel on.” Sir, this is a selfish fear, and it is as idle as it is selfish. All experience shows that the establishment of roads into the country, instead of lowering the value of property around the town, has invariably increased it. Listen upon this point to the language of Adam Smith. The last clause is that on account of which I read the passage, but the whole contains truth so weighty and important that I make no apology for giving it entire :—

“ Good roads, canals, and navigable rivers, by diminishing the expense of carriage, put the remote part of the country more nearly upon a level with those in the neighbourhood of the town. They are upon that account the greatest of all improvements. They encourage the cultivation of the remote, which must always be the most extensive, circle of the country. They are advantageous to the town, by breaking down the monopoly of this country in its neighbourhood. They are advantageous even to that part of the country. Though they introduce some rival commodities into the old market, they open many new markets to its produce. Monopoly, besides, is a great enemy to good management, which can

never be universally established but in consequence of that free and universal competition which forces everybody to have recourse to it for the sake of self-defence. It is not more than fifty years ago, that some of the counties in the neighbourhood of London petitioned the Parliament against the extension of the turnpike roads into the remoter counties. Those remoter counties, they pretended, from the cheapness of labour, would be able to sell their grass and corn cheaper in the London market than themselves, and would thereby reduce their rents and ruin their cultivation. Their rents, however, have risen, and their cultivation has been improved since that time."

Sir, in what is here recorded of the landowners about London, we may find some little show of comfort. It is true that what took place fifty years before the publication of the "Wealth of Nations" must have happened rather more than a century ago; but still it is a consolation that some people in the neighbourhood of London were, about one hundred and twenty years ago, as blind as some in the rural districts of this colony are at the present day. I have now concluded my examination of the principle of this bill; of the objections advanced against this bill; and of the various projects which have been put forward in its stead. Is then, I ask, this bill to be abandoned? If it be thrown out, is any member prepared to introduce another more likely to succeed? Believe me, the opposition to this measure is not a wise or well considered opposition. The farmers object,—but the farmers should remember the heavy imposts from which they have been freed, and not begrudge a moderate contribution to what will tend so directly to their own good. The time has been when the proprietor was bound, by law, to send his slaves to make and mend the public roads, and it may be doubted whether or not the emancipation has released the landowners from what may be called the statute labour of the colony. But times are changed, and I have no desire to force the farmer with his sons and servants to work upon the public road,—a description of tax the most oppressive to the individual, and the least productive to the public, of any that could possibly be devised; for

the work which is done grudgingly is always done ill. Again, the tax on stock and produce fell with the system of assessed taxes, and thus was our agriculture again relieved. I do not say, indeed, that this relief, which was a relief to all classes, would of itself give any ground for imposing an assessment upon the agriculturist as such, but it is undeniable that the relief is one which the agriculturist enjoys, and that it is much more than a compensation for the trifling and temporary assistance (which is not a tax at all) that he is now called upon to give to the formation of a great public work. Have not our farmers eyes to see that their whole dependence is, and must be, on Cape Town and its market? Can they not understand that Cape Town and its market are and must be miserably crippled, so long as a great, impassable, deep sea of sand is to be waded through by the produce on which they depend? Do they not feel that this noble work is the very thing to keep the life in Cape Town? Everywhere the great object is to facilitate the means of transport. All over Europe is this end earnestly pursued,—in France, in Belgium, in Holland. England about twelve years ago saw her first railway, and she has now seventy millions of capital embarked in those mighty undertakings. The annual revenue of her turnpike trusts presses close upon two millions. Let us make some effort here. This bill is not founded upon the old paternal principle of doing everything for the colonists, and leaving them no room to do anything for themselves. It allows you to choose your own trustees, and to manage, through them, the expenditure of your own money. I rely upon this Council, then, while modifying the details, to maintain the principle of this bill. Show the public the way that they should go. Teach them the invaluable lesson that, in regard to every public work like this, a liberal expenditure is the truest economy; for wisely hath the wise man said, “There is that scattereth and yet increaseth, and there is a withholding of that which is meet that tendeth to poverty.” The farmers say that they are poor. I fear, in too many cases, that they are so. But will any man assert that it has been by paying rates for road making that they have been impoverished? Be well

assured, Sir, that no country was ever brought to destruction in this way. What will be the consequence of negating this bill? It will stop the march of improvement everywhere throughout the colony, and, perhaps, its first effect will be to defeat the attempt which the district of George is prepared to make, to reform the Cradock Pass. But on the other hand, by carrying this bill, you will give proof that you will not place yourselves in the hands or at the head of the ignorance of the colony; that supported by the intelligence and the property of the Cape and Stellenbosch, you will confer upon those districts the greatest benefit which they are capable of receiving;—that when a strenuous effort is being made to accelerate the progress of colonial improvement, you will not be found amongst those who would fasten themselves behind the advancing wagon and strive to stop its course.

1843.

ON THE SAME SUBJECT.

[*Legislative Council, March 20, 1843.*]

The ATTORNEY-GENERAL said, that having on a former occasion stated that he should this day be prepared to announce definitively the line of conduct which he proposed to pursue with regard to the Hard Road Bill now before the Council, he should avail himself of the opportunity for so doing, which was presented by the laying of the evidence, taken by the committee, upon the table. With

respect to that evidence, he deemed it but an act of justice to the Committee to declare that it had been taken with the utmost fairness and impartiality, and with as little reference as possible to individual or preconceived opinion. Through the instrumentality of the *Cape Town Mail* the whole of that evidence was now before the public ; and with the exception of the evidently unintentional, though certainly very material, error, to which his hon. friend opposite had called to-day the attention of the Council, there could be as little doubt of the perfect correctness with which the evidence had been communicated, as of the value of that evidence to all parties anxious to discover what was truth in regard to this important question. Growing out of the examinations which had been had, as well as the general considerations applicable to the case, there seemed to exist amongst all the members of the Council an absolute conviction that something should be done. But, unfortunately, a strong feeling of opposition had been manifested, out of doors, respecting some of the provisions of the present bill ; and to the principles on which that opposition based itself, the Council was bound, and was anxious, to pay all possible attention. Many of the Council did not agree with all the objections that had been raised, and some were sorry to see such objections started against such a measure ; but every member felt it to be his duty to weigh those objections with candour, indulgence, and an anxious desire, not merely to consult the principles, but even to conciliate the prejudices, which were arrayed against the project. And even within the Council itself, in the midst of a most cordial and most gratifying manifestation of good feeling, and the utmost possible anxiety, by sinking minor differences of opinion, to carry a safe and salutary measure through, there yet appeared to be at least two expressions of a somewhat discordant sentiment, which, coming from the quarters that they did, challenged particular attention. One member of the Council conceived that important as it was to open a road to the extensive districts which lie beyond Sir Lowry's Pass, equally if not more important, as it might be, by opening another road to the great existing grain districts, to give our farmers there facilities for conveying their produce to the port,—yet that both these objects,

confessedly of the highest interest and value, shrank into comparative insignificance when compared with the advantages which would certainly be secured by opening Mostert's Hoek. This was the view of his hon. friend at the other end of the table (Mr. Breda), and coming from a man of his weight and standing in the colony, and one whose entire disinterestedness was proved by the fact that he had not a foot of land in Worcester, it was impossible not to receive it with the most respectful attention. The other opinion to which he (the Attorney-General) had adverted, was one which had equal claims to consideration, and was advanced by his hon. friend opposite (Mr. Ross). His hon. friend, not swerving in the least from his old anxiety to see a hard road made across the Flats, seemed yet to consider that the difficulties with which the present bill was surrounded were likely to prove insuperable, and that the only mode in which that great public work could be accomplished would be by performing it exclusively at the expense of the public revenue. Being firmly convinced that it would be useless to carry this bill by a mere majority, and that nothing short of absolute unanimity amongst the members of Council would, in the face of the numerous and respectable opposition which had exhibited itself, obtain for such a measure the sanction and allowance of Her Majesty the Queen, it had occurred to him (the Attorney-General) that a meeting of the members, to be held privately and in the friendly way, would be the best means of ascertaining how far the objections to the present bill were capable of being obviated, and whether, by the liberal exercise of mutual concession, and an unaffected desire to give up everything, except matter of principle, for the purposes of securing unanimity, some plan settling precisely the works to be done, and the nature of the funds to be provided for performing them, might not be devised in which all might honestly and cordially unite. On Saturday accordingly, most of the members of Council, and amongst the rest his two hon. friends, whose views he had referred to, did him the honour to come to his office; and there they had talked the matter over carefully and anxiously, and with the strongest desire to arrive at a common understanding. He was

happy to say that they had succeeded ; and he should now state shortly the result of their deliberations. First and foremost, then, he should withdraw the present bill. Having, he trusted, no overweening opinion of his own infallibility, nor any disposition to cling obstinately to his own ideas, he had not the slightest difficulty in resorting to this course,—and, as he had said, the present bill would be withdrawn in order to make room for another which he fondly hoped would receive the support of that Council and the colony. In proceeding to state the nature and objects of the new bill which it was his intention hereafter to introduce, he must request the Council to keep in mind that there were, of necessity, involved in any measure of the kind two great principles,—perfectly distinct but equally important ; one, the fixing of the road or roads to be laid down ; the other, the fixing of the funds out of which the expense should be defrayed. Now, with regard to the first of these points,—the lines of road, he (the Attorney-General) would at once declare that, could it be accomplished, he would desire to open a road for the Overberg farmers directly to Brink's Drift, or in other words to make line No. 1,—to open another road by Stickland, running thence into the grain districts ; to open Mostert's Hoek, and connect the fine country beyond with the road just described ; and then having found out, by the aid of a completer survey than had yet been taken, the best line of road to suit the Koeberg farmers,—to complete the plan by putting that line into good order, believing that the mind of man could scarcely conceive the amount of ultimate advantage which would be reaped from the completion of these works, and that no other system of roads for this end of the colony could be devised which would be attended with so many benefits. Indeed, so much was he impressed with the advantages likely to be derived from the first of the lines of road which he had intimated, namely, line No. 1, that, if that line could be made at an expense averaging not above one-half per mile more than the proposed line,—or, in other words, if the proposed line could be made for £1,000 per mile, he should not begrudge for line No. 1, £1,500 per mile, so highly was he inclined to estimate the benefit of giving to the Overberg people a direct road, and superior

feeding for their cattle. But he felt that he was not in a situation to effect this object. The man who, more than any other man in the colony, was qualified to form an opinion upon this subject, and who had acquired the materials on which to found a judgment by a degree of exertion upon his part which laid the public under obligation to him (Col. Mitchell) had come to the conclusion that he could only recommend the formation of a road upon line No. 1, in case the Council were prepared to disregard all considerations of expense—a position which he (the Attorney-General) would shrink from taking up, and which he should not, for an instant, dream of advising the Council to adopt. But, as he had already said, if material sufficiently good for road making could be found along line No. 1,—or if better materials could be found at either end and thence transported towards the centre by means of anything like a moderate outlay,—so much did he prize the principle of securing the straight short road and superior outspanning for the farmers Overberg, that he would have been prepared to submit to the Council the propriety of attempting that work. And had he been in a state to effect this object, he would, in the new bill, have deemed it right and fitting to embrace Caledon in the modified scheme of assessment, the nature of which he would presently explain. But in the face of the evidence then upon the table, it would be very unjust to call on Caledon for any contribution to the proposed line, for, though he agreed in a great measure with his hon. friend opposite (Mr. H. Cloete) and conceived that, however much a supposed shortness and superior feeding for oxen might, at first, confine the Overberg farmers to their present road, yet that after all and in the long run, they would find facilities on the proposed line which would much more than counter-balance the advantages of that now in use, and would speedily discover that they consulted their interest by shunning the hummocks and the heavy soil which it was now necessary to encounter, and by taking an inconsiderable circuit in order to enjoy the benefit of a solid road. Still, however, there were, he believed, only two other witnesses who concurred with his hon. friend in thinking that the Overberg farmers would make use of the proposed

line. The opinions of those witnesses, Dr. O'Flinn and Mr. Faure, were supposed to be influenced by the fact that they were both Stellenbosch men (though why their perfect impartiality should, on that account, be suspected, he did not know, for the difference between the two lines was not of much importance to the town of Stellenbosch), but while exonerating them fully from the slightest bias, it was impossible not to admit that the weight of evidence went to show that the Overberg farmers would not make use of the proposed line, and he should, therefore, decline to tax people who must now be taken not to benefit by the road, and who did not reside in the districts through which the road ran, for the purpose of accomplishing a work with which it was so strongly urged that they could have no concern. If, then, we were to give up line No. 1, we must also with it give up Caledon. The proposed line would then become the only practicable one and he therefore contemplated its completion. This line would open a road, if not for the Overberg districts, at least for other districts scarcely less important. And, in the new bill, he should not confine the work to this one object, but would, at once, include the complete opening of Mostert's Hoek. Declining to pause at present to point out the vast and universally admitted benefits which must flow from the achievement of this great work, he would merely remark that with the exception of a little sand beyond Stickland, which could easily be conquered, the whole road which would lead from Mostert's Hoek, through Rooi Sand Hoek, past the Paarl, down to the proposed line, would be an admirable one, "almost like the Heerengracht," as Col. Mitchell had that morning said in the course of conversation. To accomplish the opening of Mostert's Hoek would entail, under the most economical management, considerable additional expense ; and as no district in the colony was so much interested in having that barrier broken down as Worcester was, he should propose to embrace Worcester in the small assessment which alone, for reasons to be given presently, the new bill would contemplate. They would, thus, have done much in the way of improving their internal communications. But feeling the

reasonableness of the objections made by the farmers of Koeberg and all Zwartland to their being called on to contribute to make roads for other people,—they themselves receiving no equivalent,—he should make the formation of a road, for the inhabitants of those valuable districts, to be laid down along the most convenient line that after accurate survey made could be selected,—another object of the new bill. What he proposed to the Council to do would then stand thus : to make a road along the proposed line, in case line No. 1 should, as he feared it would, prove to be impracticable :—to make a road along line No. 1 if it could reasonably be done, and in that case avoid the necessity and save the expense of turning the present proposed line across the Kuils River ; to complete, in any event, a line of road which would run from the Salt River through Mostert's Hoek ; and to make a good Koeberg road in order to facilitate the approach of the farmers in that direction to the Cape Town market ; the whole to constitute one trust, to be managed by one set of trustees ; and to be paid for, in part, by the immovable property in the divisions of the Cape, Stellenbosch, and Worcester.

Mr. Ross :—Say by the occupiers —

The ATTORNEY-GENERAL said, his hon. friend could perceive that in speaking of the assessment of immovable property he had not indicated the parties by whom that assessment should be paid. But he took advantage of the remark of his hon. friend for the purpose of stating, that although, considering the tenures of this colony, he had been led to think and to argue in that Council that the owners of immovable property should be exclusively assessed ; yet as objections to this principle had been urged by the Municipality of Cape Town and by other persons whose opinions he respected, and whose opinions upon such a point he would, at all events, willingly defer to, he would, in the new bill, omit the obnoxious provision, and insert in its place the language used in the Municipal Ordinance of Cape Town.

Mr. BREDA :—Hear, hear.

The ATTORNEY-GENERAL was happy to be able to make this one

of the instances which evinced a willingness to surrender an individual opinion in order to ensure, if possible, that general approval and support which it was a pity should be withheld from undertakings of so much interest and importance. In entering into a statement of the mode in which the assessment so to be imposed would (as he hoped) be made a very light one,—he would pause to point out to the Council the importance of the changes proposed to be made by the new bill, and the favourable effect upon its ultimate success which those changes seemed to promise. By including Mostert's Hoek he had carried with him his hon. friend at the other end of the table (Mr. Breda), and that very large number of well informed persons who considered the opening of that pass the most useful work that ever £10,000 was devoted to accomplish. He believed that in England the most experienced agriculturists calculated that one-seventh was not too much to allow for seed. In Zwartland, and its neighbourhood, he understood that a return of tenfold might be considered the average production. But, if he were not misinformed, the rich alluvial soil of the Warm Bokkeveld, and even, perhaps, of the Cold Bokkeveld and the adjacent lands as well, would justify the use of the Scripture language expressive of extreme fertility, and might be literally said, in regard to the seed committed to its bosom, to produce “some thirty, some sixty, and some one hundredfold.” Considered in this point of view, how valuable must be the work which will lay open the natural riches that now lie concealed in a country of this description? Here, certainly, there was strong ground to go upon; and he (the Attorney-General) was glad to follow, into it, his hon. friend (Mr. Breda); and he had no doubt that the whole of this end of the colony would be found to follow him with equal willingness. But connected with the outlay which would be demanded, there arose a very important consideration suggested by his hon. friend opposite (Mr. Ross), and one which he hoped to treat in such a manner as to secure the support of the hon. member and the general concurrence of the Council. There could, he believed, be little doubt that the principal objections to the present bill,—whether they took the shape of a preference

to soft roads over hard roads ; or of the greater justice of an income tax than a property assessment ; or of the hardship of taxing owners exclusively and allowing occupiers to go free, were at bottom founded upon an idea,—perhaps an exaggerated idea, but certainly not an unnatural one,—that many of our colonists, and particularly of our farmers, would be distressed by being called upon to contribute the whole expense of completing the projected undertakings. With the wine farmers especially, this was supposed to be the case, and his hon. friend (Mr. Ross) viewing the works in question as works of general utility (which they unquestionably were), seemed disposed to recommend that they should be undertaken by the colonial government and paid for out of the colonial revenue. He (the Attorney-General) could not go to the whole extent of this position, but it was only fair to say that it had a show of reason in its favour. His hon. friend had plausible grounds for his opinion. When his hon. friend himself had been chiefly instrumental in the abolition of the assessed taxes, and the substitution of additional customs duties in their stead, it was calculated that the customs, even under the able management of his hon. friend (Mr. Field), would turn out well if they realized £40,000 a-year. But instead of realizing only £40,000, he believed he had the authority of his hon. friend for saying that he contemplated £60,000 as the probable amount which the customs would annually contribute to the general revenue. When, therefore, a receipt of but £40,000 from the source in question was supposed to be sufficient to enable this Council to meet the public exigencies, a receipt of £60,000 instead, would seem to argue a presumptive surplus, and were it not that the Serbonian Bog,—the paper debt—stood ready to engulph every superfluous penny in the treasury, there could be no doubt that we should soon have some money to bestow on the encouragement of public works. It was, however, quite clear, that until the question of the paper debt were, in some way or other, settled, our limbs were fettered, and we could not be allowed to go forward in the career of colonial improvement. It would be utterly in vain for them to ask Her Majesty's Government to reconsider a judgment already solemnly and repeatedly

pronounced, or to expect that they could ever disengage a surplus for the promotion of such objects as those in view whilst the paper money debt or any considerable portion of it remained to be provided for, and the British treasury was burthened with the irksome guarantee. He believed that when his hon. friend, the Acting Secretary to Government, who had already been able to do a great deal in that way, should have accomplished the destruction of another £20,000 worth of that paper, which he was getting ready for the flames, the whole balance still remaining would be £124,000, or thereabouts.

ACTING SECRETARY TO GOVERNMENT :—£121,000.

The ATTORNEY-GENERAL continued by observing that when their debt was thus reduced to £121,000, there was reasonable ground to hope that they might safely grapple with it. The plan of putting forth a new issue of Government notes, convertible into gold at the will of the holder, and to be paid on demand by his hon. friend beside him (the Treasurer-General), in his commodious office in the yard below, had been approved of by Her Majesty's Government, and he believed that His Excellency only awaited now the mechanical means of putting it into execution, namely, the arrival from England of the necessary notes. He was aware that there was a difference of opinion as to the precise amount of such a circulating medium which the colony would spontaneously absorb. Some would rate it nearly as high as the whole debt to be provided for,—others might calculate that but few even of such notes would remain abroad, while he (the Attorney-General) believed that the truth would lie between. But however this might be, it seemed very clear that when it was remembered that whatever amount of the new notes would remain outstanding was so much of the old paper debt cancelled (less, of course, the amount of specie which might be required to keep the new notes convertible), and that to meet the annual interest of whatever sum it might be necessary to borrow in order to pay off the balance (should that course be ultimately taken), we had the increased income from the customs already spoken of,—there was nothing in our financial condition calculated to appal the Council, or induce them to doubt that, with

energy in collecting their ordinary revenue and rigid economy in its expenditure,—they might safely undertake to provide for the complete redemption of the paper debt, and, at the same time, find means to forward the execution of some pressing public works. If these anticipations were well founded, the next question would be, were the works to which he had already adverted, and which would be the subject matter of the new bill, works of such a nature as to justify the application of a portion of the public funds in order to assist in their formation? He apprehended that here no difference of opinion could exist. When it was considered how much the general interests of the colony were involved in the improvement of its internal communication, and how much the public prosperity would be promoted by a good hard road from Cape Town to Sir Lowry's Pass,—by making Mostert's Hoek an easy thoroughfare,—and by assisting the Koeberg farmers to bring their produce to the market,—the natural and expedient course obviously was to combine the principle of local assessment with the principle of Government contribution, and, by the common operation of both, to carry into effect the ends in view. Influenced by these considerations he (the Attorney-General) would further propose that when the intended bill should have passed the Council, His Excellency the Governor should be requested to apprise the Secretary of State that the Council confidently anticipated that the paper debt, being amply provided for, the revenue would still show a surplus,—that such a surplus could not, they believed, be devoted to any better object than to assist the accomplishment of the works contemplated in the Ordinance transmitted for Her Majesty's approval or disallowance,—that they therefore looked to his lordship to obtain Her Majesty's authority enabling this Council, when passing the annual estimates, to vote, out of whatever surplus might appear to exist, such a sum towards the fund for forming the works in question (not exceeding, in any case, the annual amount to be raised by the three divisions by means of the general assessment), as the Council should deem fit,—and that if, for reasons which he (the Attorney-General) could not readily imagine, and which he ventured to say Lord Stanley would, under all

the circumstances, be very slow to interpose,—his lordship should feel that he could not advise the Queen to give to this Council the authority requested ; then, that His Excellency should further be desired to state that, as the bill had passed the Council upon the distinct understanding that the latter should be invested with such an authority, and as that distinct understanding had been the means of inducing many parties who could but indifferently afford it, to consent, with cheerfulness, to an assessment on their property, his lordship would be pleased, at once, to disallow the Ordinance *in toto*,—the condition on which it had been carried having altogether failed. But he (the Attorney-General) felt little apprehension on the subject. When His Excellency sent home General Bell's memorandum recommending an issue of the old paper money for the purposes of public works, the reply of Her Majesty's Government, although unfavourable to the project of his able and excellent friend, discovered no indifference towards the objects which he advocated, but merely told us to remember that we should be just before being generous, and that we must get rid of our incumbrances before we proceeded to lay out our money to improving our estate. And if the authority adverted to should be conceded, and the public revenue be applied to defray, say one-half of the expense of constructing the works in question, could he (the Attorney-General) be mistaken in believing that every colonist would rejoice to see such an amount of good so cheaply purchased ?—that every man, and every woman, and every child in the three divisions would discern the signs of the times and see the importance of the ends in view, and that instead of having 1,200 petitioners against the new bill, they would have 2,000 petitioners in its favour. Another matter had been agitated in committee which His Excellency and the Council would not fail to bear in mind. His hon. friend, the Acting Secretary to Government, had there declared that, in his opinion, the proceeds of the lower toll should be applied to the purposes of the intended road. This arrangement would be obviously just. The lower toll was to be justified only by the necessity of preventing the upper toll from being evaded. If wagons and other vehicles might enter at the lower gate, toll free,

very few such articles would be found to pay at the upper toll, and hence, a charge at both places was necessary to give to the Simon's Town toll an adequate protection. But there is nothing of even-handed justice in forcing the Koeberg farmer, who comes over what is now a very bad road,—and the Overberg or Stellenbosch farmer, who struggles to Cape Town through downs where there is no road at all, to pay towards the Simon's Town road the same toll which is paid by the man who comes from Simon's Town. It was proposed, then, to make the terminus of the contemplated roads, not the Salt River House as fixed by the present bill, but the lower toll-gate, and to arrange that the tolls received at that gate should be devoted to their natural object, namely, the formation and continued maintenance of the roads proceeding from that point. Even now this toll might be calculated at £500 a year; as the traffic increased it would increase also, and as there was little doubt that the Secretary of State would approve of such an appropriation of those tolls as had been now suggested, another relief to the rate-payers would thereby be provided, while, at the same time, by continuing to levy the same charges as at present, the upper toll would be protected as efficiently as ever. He had now stated, he hoped distinctly, the plan of the measure which he intended to introduce. Withdrawing the present bill, he would, with all convenient speed, bring in another, so different in its scope, and characterised by so many concessions to public and even individual opinion, that he confessed he did anticipate for it complete success. Certain he was that if the measure of which he had then given an outline were received out of doors with the same degree of fairness, candour and single-mindedness, which it was confident it would experience within, the Ordinance would go home under circumstances eminently calculated to recommend it to the favourable consideration of Her Majesty's Government; and thus a set of works be, at length, accomplished, which would stimulate more industry, disengage more capital, and create more wealth than could readily be expected to arise from what would be, after all, but a very limited expenditure, and which the same expenditure could not produce in this, or, perhaps, in any other quarter of the colony.

ON THE SAME SUBJECT.

[*Legislative Council, March 20, 1843.*]

ATTORNEY-GENERAL :—But for the views which have just been thrown out by my hon. and learned friend, I should be able to prepare and introduce, almost immediately, such a bill as I have already endeavoured to describe. It is due, however, alike to the importance of the question, and to the opinions of my hon. and learned friend, that the suggestions which he has offered should be attentively considered ; and, as the ideas which he has advanced—or at least some of them—may require to be tested by experiment, a little delay will probably be inevitable. First, with regard to the line No. 1. My hon. and learned friend, like myself, does not willingly abandon the notion of this line ; and it strikes me that there is a mode by which its practicability may be conclusively ascertained. A certain sum,—I believe one hundred pounds or thereabouts,—was subscribed some time ago to defray the expense of a plan of the Flats. That plan,—thanks to Col. Mitchell,—is not now required. Might not, then, the sum referred to,—augmented, if necessary, by some new subscriptions,—be applied to the making, out of the materials to be found along line No. 1, a piece of road of such a length as would enable every one to judge whether a road sufficiently serviceable could or could not be constructed ? If this view should be considered reasonable, and the necessary experiments set a-going, we should speedily be placed in a position to determine, by actual trial, a point upon which authority, however eminent, does not, it would seem, carry unlimited conviction. The preparation of the new bill must, of course, await the result of the requisite experiments should it be found advisable, under all the circumstances, that such experiments should be made. My own *beau idéal*, as I have already said, is the three roads, the direct line to Brink's Drift ;—the direct line to the

grain country, and on through Mostert's Hoek ;—and the direct line to Visser's Hoek. The first of these,—the line No. 1,—I should, I repeat, as far as my own ideas are concerned, purchase at an outlay of one-half more per mile than either of the other lines would cost. My hon. friend opposite (Mr. H. Cloete), differs from me here. He thinks that I overrate the advantages of this particular line. This may be the case ; and I am, therefore, glad to observe that my hon. and learned friend, his relative, has not anchored himself to any one particular plan, but is disposed, while stating his own views, to concur in whatever the general opinion of the Council may determine. With those three lines completed,—it to complete them would be practicable,—we might safely stop. Eiland's Kloof may be considered afterwards. No doubt the opening of that pass would avoid the necessity of going from Mostert's Hoek round by Rooi Sand Hoek, and so save two or three hours ; but this, just now, is comparatively unimportant, and is a thing which may be done hereafter. The only other portion of the speech of my hon and learned friend which I feel called upon to notice, is one from which I am reluctantly compelled to dissent. I allude to his project in regard to the raising of the funds. I fear it would never work. Even were all other difficulties out of the way, it too much resembles the plan already laid before the home government, and deliberately rejected, to stand the chance of being received by Lord Stanley with much favour. It is right, however, to say that my hon. and learned friend's plan is not Col. Bell's plan, although it resembles it. Col. Bell wished Her Majesty's Government to permit the issue of a certain amount of paper money, and to rely for ultimate liquidation upon the increased revenue which would be sure to spring out of the developed resources of the colony when assisted by the formation of important public works. My hon. and learned friend wishes Her Majesty's Government to issue a certain amount of the paper money, but proposes, instead of trusting to the security of the general revenue, to hypothecate the whole of the immovable property in the three divisions, which must all be excused before the home government can lose their debt. The general resemblance, how-

ever, between the plans still remains so marked as to ensure, in my opinion, the rejection of that which has been now suggested. And, after all, even if conceded, I do not see how my hon. and learned friend could save more than the interest of the money. He seemed to calculate upon paying off £5,000 a year from the proceeds of the tolls. But he forgets to take into account the cost of keeping up his roads. I have had some doubt as to whether the tolls would prove sufficient for this purpose alone. When I formerly spoke of £36 per mile per annum as the average cost of keeping up the turnpike roads of England, I have reason to think that I was under the mark, and that £50 would have been a closer approximation to the truth. Climate and other circumstances distinguish the cases of this colony and England ; but it will, I am confident, require careful management to make the proceeds of your tolls cover the charge of maintaining your roads. Again, it is to be recollected that unforeseen contingencies,—Kafir wars or Natal Establishments,—if they should occur,—might furnish a temptation to the Colonial Government for the time being to make use of the instalments paid in by the road trustees, and so, as far as the tolls are concerned, deprive Her Majesty's Government of that security, and cast the whole burthen of the debt upon the very inhabitants whom my hon. and learned friend thinks he could relieve, almost entirely, from contribution. With reference to the other plan, namely, that of the intended Ordinance, it is certainly true that, if it cannot be called into operation until £121,000 of paper money shall have been destroyed simply by the application of surplus revenue,—it is removed to a considerable distance. But it is not proposed that the encouragement of public works should await the tedious process just referred to. In all probability there are now upon the sea the blank forms required for the new issue of Government notes already mentioned, which your Excellency is empowered to put into circulation. I cannot but perceive that this announcement is far from giving unqualified pleasure to my hon. friend near me (Mr. Ebdon). But the fact is so ; and our business is to make the best of it. How much, then, of your £121,000, old paper money, will your new paper money

destroy? I am unwilling to offer any opinion upon a point which will so soon be submitted to trial. Perhaps my hon. friend (Mr. Ebdon) would regard £20,000 as the utmost extent to which we can go; while my hon. friend opposite (Mr. Ross)—more juvenile and sanguine,—might allow his ideas to range as high as £100,000. It is clear that whatever portion of the debt you do not settle by means of your new paper money, you may fund. Funding £20,000 at 5 per cent. would cost £1,000 a year, and no more. Funding £50,000, at the same rate, would be only £2,500, and would surely leave us some available surplus. But even say you fund £100,000; the annual charge for that will be but £5,000 after all; and, the revenue remaining in its present state, you might, I think, encounter that payment of £5,000,—and provide annually another £5,000 to carry on the projected undertakings. This view appears to me to be the simplest and most practicable, and by adhering to it we shall avoid the unpleasantness of serving up to Her Majesty's Government a dish which they have tasted before and declared they do not relish.

THE INSOLVENT LAW.

Mr. Ross said :—I beg to ask the Attorney-General if there is any prospect of a bill being brought in, as we were at one time led to expect, for the purpose of amending the insolvent law. I can assure him that acts of great injustice are continually occurring, and that the mercantile body are subjected to perpetual inconvenience, from the imperfect nature of the insolvent law of this colony. I could bring forward numerous instances of the injury resulting from the present state of things in this respect; but to show the importance of some measure of relief being afforded it is only necessary to point to the fact of the unwillingness of capitalists to lend money to the farmers under any circumstances. In consequence of the uncertainty produced by the present state of the law, they would rather lend their money to the banks at four or five per cent., than to agriculturists at six.

ATTORNEY-GENERAL :—In reply to the question put by my hon. friend, I can with safety assure him that the subject to which he has adverted has never been altogether absent from my recollection, since the report of the committee upon the insolvent law was laid on the table. He will be aware that the report entered so fully into the subject of the suggested alterations, that to frame such an Ordinance as should embody those alterations, would be little more than a very simple and easy piece of pen and ink work. The most important change suggested was in that part of Ordinance No. 64, which defines what shall be considered, and avoided as, undue preferences. With the law, as it now stands, many persons are dissatisfied. But whether it be possible to legislate on such a delicate subject in such a way as to avoid dissatisfaction, may well, I think, be doubted. I have been and still am of opinion, that the law, at present, is too stringent ; and that while it purports to produce equality amongst creditors, it sacrifices to that object the just security of dealing. The judges have, I know, given great attention to this and other points ; and one of them, Mr. Justice Menzies, has sent in a very able paper founded upon the report of the committee ; but he leaves off just at the vexatious and agitated question relative to undue preferences, and has not yet had leisure to complete his task. The Chief Justice was anxious that the whole of the judges should be able to communicate their views upon the subject before the Council legislated ; and having, in a conversation which I had with him before he started on circuit, consulted me about postponing his observations until after his return, I ventured to tell him that, hurried as he necessarily was, he might do so without inconvenience to the Council. In connection with the general question, I may remark, that in a volume of Ordinances passed by the Legislative Council of New South Wales, I find our Ordinance No. 64. introduced into that colony (I suppose under the advice of Mr. Justice Burton) ; and amongst some changes, chiefly verbal, made in it, one far from merely verbal change. This occurs in the section which corresponds to our section 7, and so far from thinking, as I do, that that section as it stood went too far, the Legislature of New South Wales appear to have thought

that it did not go far enough ; since, instead of declaring void only such alienations as should be made by a debtor who *knows himself to be insolvent*, they make his self knowledge altogether unnecessary, and avoid the transaction, if at the time the debtor *actually be insolvent*, whether he knows it or does not. This, certainly, is not mincing matters. I was sorry to read, in the Sydney papers, the long list of recent bankruptcies. It argued a degree of monetary pressure which I unaffectedly deplore. But, what is bad for the merchants may be good for the lawyers ; and if the law regarding void transactions, as comprised in their altered 7th section, is to be boldly and searchingly administered, and all the transactions which in their heavy and multitudinous insolvencies will be found to fall within it fearlessly attacked,—I can only say that the Attorney-General of New South Wales ought to be a happy man, and that I wish unfeignedly I had his place. But, turning from this digression, I wish to state that I shall not do anything definitive upon the subject, without the co-operation of the Chief Justice. I shall, however, endeavour to make some advance before His Honour's return in the preparation of three Bills:—one to amend the law of tacit mortgages ; one to make some changes in the practice relative to general bonds ; and one to treat of the insolvent law. The Chief Justice and the other judges shall, however, fully understand what is intended, before any of these bills is laid upon the table.

ON MUNICIPAL ASSESSMENT OF GOVERNMENT BUILDINGS.

[*Legislative Council, March 20, 1843.*]

The ATTORNEY-GENERAL said :—I do not know that there is much, if anything, to be added to what is contained upon this subject in your Excellency's minute. The history of the bill which is now to be repealed, will be fresh in the recollection of the Coun-

cil. The Cape Town Municipality demanded that the immovable property belonging to the Crown should be assessed for the purpose of municipal taxation. No other Municipality in the colony had ever made a similar demand; and as it was evident that one weight and one measure should be used in all cases of the same kind, it became necessary to consider whether the principle of assessment should be withheld from Cape Town or conceded to the other corporations. Your Excellency and your Executive Council, upon a review of the relations subsisting between the general government and the municipal bodies of this colony, were of opinion that such a charge as that sought to be made by the Municipality of Cape Town was not an equitable charge. We conceived that the public revenue contributed so much towards certain objects which were mainly of municipal advantage,—that the principle of set-off was fairly applicable to the case, and that that principle furnished a sufficient answer to what was admitted, for the sake of argument, to be a *prima facie* right. The effect of the Royal Prerogative was alluded to in the discussion in this Council, but only to be rejected as too questionable a principle to rest resistance on, and the matter was argued upon the ground referred to, namely, that of compensation. I gather from the minute of your Excellency that the Secretary of State does not consider this principle of compensation, or set off, a proper one to apply to such a case; and that, in his lordship's opinion, the better way is, to admit the present demand, and go into a separate inquiry in order to settle the extent to which, hereafter, the general revenue is to contribute to purposes of municipal convenience. Such being his lordship's views upon the subject, it is the duty of the Executive to follow them implicitly, whatever their own private opinions might chance to be (and my own, I confess, is not even yet completely in accordance with that of the Secretary of State, for I for see no small difficulty in conducting the inquiry which he directs), and in obedience to those views a repealing Ordinance has now been laid upon the table. I think I may safely say that, neither in the cheerful readiness with which the government obeys the decision of Lord

Stanley, nor in the original introduction of the measure which is now to be rescinded, has the Executive Government shown any ill-will to municipal institutions, or any desire to interfere with the fair and proper rights and privileges of the Cape Town Corporation. I venture, upon this subject, to speak for all my official friends as well as for myself, who had early in this colony an opportunity of evincing, in the preparation of the present Cape Town Ordinance, my desire to confer powers and privileges in no niggard or unfriendly spirit, and who have since been glad, whenever the commissioners could make me of the smallest service. When the repealing Ordinance shall be passed, the Municipality will have a right to send their collector for the tax, and it appears to me that your Excellency should arrange that all other Municipalities should be placed upon the same footing. I am convinced that you are just as little disposed as I am myself, to give to a comparatively powerful claimant what you would withhold from claimants not so powerful. The other Municipalities ought, in my opinion, to be informed that, as they have the same legal rights as Cape Town, the government is prepared to recognize them to the same extent. If, hereafter, any new principle should be introduced with reference to the amount which the general revenue is to contribute for municipal purposes,—all Municipalities equally must be governed by that principle. But, in the mean time, all Municipalities equally are entitled to assess the immovable property of the Crown. Graham's Town is, of course, in the same position with Cape Town ; and it is an obvious dictate of common justice, that neither of these two influential Municipalities should enjoy a single advantage which is not equally participated in by Beaufort, by Cradock, or any other the humblest corporation in the whole colony.

ON THE DEEDS ATTESTATION BILL.

[*Legislative Council, April 23, 1843.*]

Council then went into committee on the Deeds Attestation Bill.

The ATTORNEY-GENERAL said, the only change in this Bill, not merely of a verbal nature, which he contemplated proposing, was one that had been suggested by one of the judges; namely, the insertion of a provision to the effect that where a will, or other instrument, happens to be written on more leaves than one, each separate leaf should bear the signature of the party and of the attesting witnesses. The object of this was to prevent fraud. It was clear that if any instrument, a will, for instance, were written upon the three leaves of paper then in his hands,—the first only of which was signed by the testator, there was nothing to prevent the two of them from being removed and two others from being substituted in their room, which, although made so as to connect in reading with the leaf left, should entirely change the nature of the document. By requiring that each separate leaf should be signed, this species of fraud would be effectually prevented. The only reason why he had omitted to make this provision when originally drawing the bill was grounded on a doubt whether this might not be considered an improvement so foreign to the habits of the people of this colony that they might not readily fall into the practice, and that thus, in attempting to prevent fraud, we might possibly invalidate many *bonâ fide* instruments. But it had occurred to him (the Attorney-General) that,—by means of a Government advertisement, which might be afterwards printed in the form of handbills, and extensively circulated by the aid of the civil commissioners, clergymen, and field-cornets throughout the colony,—very simple directions as to how wills should be made, might serve to spread sufficiently a

knowledge of the simplified system in regard to such instruments which the Council proposed to substitute for that which formerly existed. It certainly appeared to him that in no way other than that proposed could perfect security be obtained.

Mr. EBDEN believed that in England every sheet must bear the signature of the testator, but it was not required that every sheet should be signed by the attesting witnesses.

The ATTORNEY-GENERAL said that his hon. friend had in substance stated the former practice in the mother country. But the law there had been altered. By the Statute of Frauds, real property could only be devised by a will signed by the testator in the presence of three witnesses; while wills bequeathing personal property, not being within the statute, required to be witnessed by no witnesses at all. The consequence was that half a million of money might be left—(stock in the public funds was made, by some Act of one of the George's, bequeathable by will witnessed by two witnesses)—by a testamentary writing totally unattested, and even the will itself, as was, he believed, the case with the famous will of Jenny Wood, of Gloucester, might be collected from a number of loose papers huddled altogether. This was not a satisfactory state of things; and accordingly the recent Statute of Wills, founded upon the report of the Real Property Commissioners, has abolished the distinction between wills of realty and wills of personalty, and made two witnesses necessary to every sort of will. But it was a little singular that although the practice of conveyancers, under the old law, had been to require that the name of the testator should be signed upon every sheet of paper, nothing of the kind seems to be contemplated by the Act of Victoria, and he took it that, under that Act,—a will in England, though written upon fifty separate leaves, is valid if the last leaf be signed by the testator and the witnesses. If, therefore, the Council should adopt the alteration which he now proposed, a rule would be established for this colony somewhat different from the rule which prevailed in England, but analogous, he believed, to that which had for the sake of security at all times obtained in Scotland.

ON THE INSOLVENT LAW.

[*Legislative Council, June 13, 1843.*]

Mr. Ross :—If there is no other business before the Council, I would beg leave to call the particular attention of Her Majesty's Attorney-General to the Ordinance so long promised on the subject of the insolvent law. A decision has been given in the Court of Justice yesterday which has created the greatest alarm throughout the colony. As an individual I can state that, according to that decision, I only need to have one enemy in a house with which I have dealt for years, who should choose to declare that he knew himself, six or seven years ago, to be in a state of insolvency,—and I would be a ruined man. When I last called the attention of the Attorney-General to this subject, his chief, if not his only reason, for not proceeding in the matter was, that the Chief Justice, who had promised to make some report upon it, was then in the country. His Honour has now, however, been some time returned, and this decision of the court yesterday has, as I have said, created very general alarm. It appears to me that this is a subject to which the Attorney-General should give his very earliest attention ; and I am sure that nothing more is required than what I have now stated, to enlist his good feelings in behalf of the mercantile interests which are placed in such danger by the law as it now stands. I have no doubt that, if the thing is not entered upon immediately, there will be memorial upon memorial poured in upon the Government, on the subject of that law.

ATTORNEY-GENERAL :—It will be remembered that this subject was mentioned by my hon. friend when the Chief Justice was on circuit, and that the further consideration of it was postponed under an impression that on his return the Council would be favoured, through your Excellency, with the views of the judges on the principal alterations suggested in the report of the Insolvent

Law Committee, which has now been for some time before the public. I have since, however, had reason to think that the judges, or at least some of them, do not consider the suggestions of that report to be sufficiently specific to allow of their being discussed with advantage; that we have not stated with the necessary distinctness the precise mode in which it is proposed that the law should be amended; and that, therefore, they would rather reserve their opinion until the new law should be drawn out. Under these circumstances, supported by the mercantile opinions to which my hon. friend has alluded, and my own strong impressions on the subject, I have no hesitation in at once pledging myself—(Father Matthew has taught us all the use of pledges)—to introduce, within a month, a bill to amend the 64th Ordinance, and to be framed principally upon the recommendations of the report now before the Council. That report has been under the consideration of one member of the bench, who has made many just and valuable observations upon some portions of it; but he has not given his views upon the two main points of difficulty involved in the 7th and 11th sections of Ordinance No. 64, namely, alienations and payments being undue preferences. I shall now, however, proceed, without further delay, to put the recommendations of the report into ship-shape, and I hope the result will be to devise some system that shall not be liable to the objections urged against the present law. I always thought and said that the intention of the framers of Ordinance 64 is unquestionably good; but it appears to me that the good proposed is an impracticable good; a good which cannot be realized without creating far more evil than it compensates for. It proceeds upon a principle which it carries out with the greatest strictness of any system ever devised—a principle which, at first sight, seems certainly a most equitable one,—namely, to collect the greatest quantity of money to be divided among the creditors of the insolvent estate. But it is quite clear that in working out this object, the present law has introduced an instability into mercantile transactions generally, for which no occasional addition of sixpence or even a rix-dollar in the pound to the dividend in an insolvent estate can ever countervail. With this observation as to

the principles on which the new bill will be founded, I shall only now repeat my pledge, to propitiate my honourable friend by producing the draft of that bill within a month from the present time.

ON THE JUDICIAL CIRCUIT.

[*Legislative Council, June 13, 1843.*]

THE ATTORNEY-GENERAL said :—I do not know that I should have felt it necessary to trouble your Excellency with any observations after the clear and efficient manner in which the several topics brought before the Council have been treated by the Secretary to Government, were it not that upon one, at least, of those subjects, my hon. friend declined to remark,—intimating that such notice as it might require would come with greater propriety from some member more conversant than himself with the judicial system of the colony. Under those circumstances, I feel myself impelled to throw out some thoughts upon the several points which have been adverted to, although I cannot hold forth any hope that I shall be able to offer anything considered and matured with that degree of care and deliberation without which it is very expedient that topics so difficult and delicate should not be touched upon by any member of this Council. Could I have foreseen what was coming,—and more particularly the introduction into this discussion of the whole judicial system,—I should have endeavoured—since forewarned is forearmed,—to prepare myself to state my sentiments in a manner which, having been the result of previous meditation, there would be little likelihood that I should afterwards see occasion to modify or alter. I was aware, indeed, that my hon. friend (Mr. Ebdon) meant to make to-day some remarks upon the annual estimates; but I did not then discover that connection between the estimates and the judicial system which has led my hon. friend to the subject matter of the observations which he has offered here to-day. With reference to those observations, however, I am bound to echo

the commendation bestowed on my hon. friend the Secretary to Government, and to say, that, in their general tone and temper, there was nothing with which any one could quarrel. He has spoken about matters, where there were temptations to go wrong, with great good humour ; both the hon. members who succeeded him have spoken with equal temper ; and it is my hope, upon this occasion, to follow the multitude, not to do evil, but to do well, and to speak, myself, with great good humour too. In that spirit my hon. friend will allow me to express my admiration of the many different and difficult points which he contrived to put into one short speech,—for it was a short speech in every sense, and, considering the subjects of which it treated, one of the shortest speeches ever spoken. The Judicial System ; the Pension List ; the Robben Island Committee ; the State of the Revenue ; Emigration ; Public Works ; and the Negro Fund,—have all been compressed,—by some force to which the Bramah Press is but a trifle,—into something about three quarters of an hour ; and I am really surprised at the skilful manner in which my hon. friend has handled, upon this occasion, such a multiplicity of topics. And, first, I am called upon to notice the remarks which were made regarding the powers and privileges of this Council, and the several disputed topics which have been referred to the Secretary of State. I do not understand my hon. friend as intending, upon this subject, to impute any blame to your Excellency or the Executive. It is clear as light that no blame can possibly attach. The matters in question were discussed in this Council at great length, —at greater length, indeed, than the public altogether relished ; though by no means more voluminously than their constitutional importance warranted ; and when we had done discussing them they were transmitted to the Secretary of State for his decision. The Secretary of State, impressed, I presume, with the magnitude of the subject, and fearful to do anything in a matter of such extreme importance without great deliberation, has not yet favoured your Excellency with his views upon our controversy. The appeal, however, is still pending, and I will venture to promise that as soon as your Excellency is apprised of the judgment of the superior court,

you will lose no time in communicating to this Council the result of a reference with which its powers and privileges are so intimately connected. Under these circumstances no censure can possibly be cast upon the Colonial Government; and my hon. friend, I imagine, has only adverted to the subject, because although quite unconnected with the estimates, he was anxious to know the position in which it stood, and apprehensive that he might not have another opportunity. The next topic upon which my hon. friend observed, was the administration of justice in this colony. He says it is far too dear, and computes it to cost about one-fourth of your whole annual expenditure. This, certainly, is a large amount. I should not have thought that it was quite so large, but being unable, at present, to check the calculations on which his estimate is founded, I shall take it for granted that it has been accurately framed. Admitting, then, as I have already done, that the expenditure is large, I must yet express my confidence that your Excellency, and my hon. friend himself, and every member of this Council, will agree with me in thinking that while economy is a good thing, there may yet be too much of it; and that economy in the administration of justice is a very suspicious principle of action. If you want to have a good article, you must pay the price of a good article. This is an axiom which my hon. friend will, with myself, recognize at once. And in considering the charge attendant upon the administration of justice, we should never lose sight of the fact, that the cost of dispensing justice to a very scattered population, spread over a very extensive territory, must necessarily bear a much larger proportion to the revenue derivable from such a population, than will be found to be the case where the people are condensed and the district to be traversed by judges, jurymen, and witnesses, comparatively small; and that in this colony the expense of anything which may be termed the administration of justice, instead of the administration of injustice, must inevitably absorb no small proportion of our revenue. My hon. friend refers to an opinion which was, he says, pronounced by the Chief Justice when at Beaufort, and considers that, by restricting ourselves to one circuit in the year instead of two, and increas-

ing the jurisdiction of the resident magistrates, a considerable saving might be made. Upon this subject I would not be understood as having formed, or as now meaning to express, any positive opinion. I am not in a position to state the amount of the annual saving which would be secured by the alteration recommended,—nor to estimate the many other important considerations which must be deliberately weighed before any change takes place. It is clear that the question of one circuit instead of two, is intimately connected with the question of increasing the magisterial jurisdiction. It will not follow, indeed, because you increase the jurisdiction of the magistrates, that you should therefore reduce the number of your circuits; but the converse is indisputable,—namely, that if you reduce the number of your circuits, you must of necessity increase the jurisdiction of your magistrates. If the question of one circuit or two is to be made a mere money matter, I have no doubt that strong grounds may be given for the change suggested. The cost of convicting our criminals, according to the present system, will appear out of all proportion. Theft is the chief crime in the colony, and yet, I should suppose, that if you were to compare the expense of a circuit made to try the thieves with the aggregate value of all the property which those thieves were to be tried for stealing, it would be found that the latter would not equal the former, nor indeed come near it. This, it may be said, is monstrous. But consider the thing more closely. Is it clear that you should, on principle, set off these items the one against the other? Is the comparative scantiness of crime invariably a ground for relaxing your endeavours to keep it down? The Celestial Emperor pays his physicians when he is well, and stops their fees when he is sick; and, upon the same principle, you should not begrudge the expenses of your circuit judges because the state of crime is what it is, but rather the reverse. But waiving this, I would observe that, in a social sense, the frequent visits of the judge are very useful in the country districts. Were we to lose sight of the fact that he tries a single prisoner, or decides one civil case, I should yet be of opinion, from what I saw when I had the honour to go a circuit with the Chief Justice, that the effect of the appearance and

addresses of such a functionary in our various district towns, is very beneficial. The jurymen, the witnesses, and the public, who always crowd the court, receive from the judge, to whom they obviously hearken with great eagerness and attention, lessons in regard to what is right and what is wrong,—what is lawful and what is not,—which they will not fail to remember, to tell to their neighbours when they go home, and to lay up for service when occasion may arise. In fact the best schoolmaster who is abroad in this colony is the judge on circuit. It appears to me that the considerations at which I have now glanced are entitled to some weight ; but having glanced at them, I shall refrain from going further and pronouncing what would be a premature opinion. But be the circuit question decided as it may, the question of the increase of the magisterial jurisdiction has an independent interest and importance. There was, some years ago, a bill before this Council having for its object the extension of that jurisdiction, but, for some reason with which I am unacquainted, it was dropped. I once read that bill, and it struck me as being a very able one, although I cannot say that, at this moment, I remember its details. But the subject, as it strikes my mind, is not destitute of difficulty. Your object is, I presume, to save expense. If you continue to have two circuits, I scarcely see how this saving can be anything very considerable. The extension of the magistrate's jurisdiction cannot, of course, affect the travelling charge of the judge. Then there remain to be considered the expenses of jurymen and witnesses —

Mr. EBDEN :—A most important item.

ATTORNEY-GENERAL :—A most important item no doubt ; and it is to that which you justly call so, that I wish to direct the attention of the Council. If the judge comes twice a year, the jurymen will do the same, and the charge in that respect will remain pretty much in *statu quo*. But it is supposed that there may be a great saving in the charge for witnesses. At present, the witnesses come to the district town to the preliminary examination. When that is over, they go home again. By and bye, when the circuit comes they are called up to the district town once more. Increase, it is said, the jurisdiction of the magistrate, and in every case which

will thereby be withdrawn from circuit, the cost of a double journey will be saved. Is this clear? I doubt it. Take a case. Wildboy is brought in to-day, charged by a farmer with stealing his ox. The farmer having missed the animal, followed up the spoor, and finding the ox at the prisoner's kraal, concluded that he was a thief; whereupon taking him by the neck, or tying him with a riem, he brings him off to the magistrate directly. The herdsman and the other witnesses against Wildboy are also in attendance, and the case seems ready for decision. But will the law of England, or any English Secretary of State, allow us to haul a man off, without a moment's notice, and put him instantly upon his trial,—no time given to him to consult his friends, prepare his case, or get in his witnesses? This can never be; and all, then, that can be done is, to take down the depositions of the witnesses for the prosecution, so as to let them go home, and remand the prisoner for a future trial. That future trial comes round, and Wildboy has his witnesses. But it is soon found that, there are several points that need more complete elucidation, and that unless we have the witnesses on both sides present together, so that, when necessary, we can confront them with each other, we really cannot try the case at all. Here seems to be a great difficulty, for you are driven to the necessity of forcing a man to stand his trial at a moment when he is not, and cannot be, prepared to do so, or else of incurring, so far as the witnesses are concerned, the expenses of a double journey.

Mr. Ross :—I would ask, which is better for Wildboy : to be tried by the magistrate at the moment, or to remain in prison until such time as the circuit judge comes round ?

ATTORNEY-GENERAL :—I feel the force of that remark ; but I think it might be answered, although I would rather not delay just now to answer it. Upon this point I shall dwell no longer, simply expressing my belief that it will not be easy to devise a system by which the prisoner shall receive a fair trial, and the prosecutor's witnesses be required to make but one journey. Resuming the consideration of the judicial system, generally, I have to record my dissent from a plan of reducing its expense which has been advanced by my hon. friend. Give, he says, one judge to the Eastern Districts, one judge to the Western Districts, and trial by jury

in civil cases, and the administration of justice will be far more economically managed. Two circuits a-year would, I fear, be rather hard work for such a small establishment, and even one circuit would keep two judges busy ; but we will let that pass. I, for one, however, frankly declare that I have no desire to see but a single judge upon the bench ; and that, in my opinion, three heads are better than one any day in the week. Many reasons might be given for this, but it will suffice to say that an algebraist can do many things with the number three which cannot be done with either two or one ; and so I rest my preference upon this algebraic reason, and will not occupy the time of the Council by stating any other. Considering that we are seven or eight thousand miles from the court of appeal, I conceive it to be very desirable that we should, if possible, have our local court so constituted as to relieve suitors from the cost and inconvenience of running continually to the cock-pit. Upon the subject of trial by jury in civil cases, I shall, at present, only state, that the subject is too large a one to be efficiently discussed to-day ; and that it is too completely distinct from any question properly arising out of the annual estimates, to be, on this occasion, a legitimate subject of discussion. Passing on, then, to the observations of my hon. friend connected with the Pension List, I have merely to remark that his suggestion, relative to the establishment of a provident fund for civil servants, is one which it would serve little practical purpose to debate ; and that,—while I frankly admit that a heavy pension list has increased, is increasing, and ought to be diminished,—I would yet avail myself of this opportunity of saying, what I am sure will meet the approval of every one who hears me ; that I should have been very sorry, indeed, if the claims of a venerable functionary, whose case was mentioned at a former meeting when I chanced to be engaged elsewhere, had not been recognized in the manner in which they have been met, and if the principle already acted on in other instances had been disregarded in such a case as his. There are, I think, numerous considerations connected with the old services, high character, and long standing in the colony, of the gentleman upon whom Her Majesty has been pleased to bestow the recent pension which will tend to make

every colonist contemplate it with pleasure. Advancing on his circuit, my hon. friend next adverted to the charge of the Kafir police. He says, as I understand him, that he would do away with the police by doing away with the treaties; but will he be allowed to do away with treaties? Does he really think that the Secretary of State will listen to a proposal,—not to work the Kaffr police system more economically,—not to turn the annual charge of that system into a fund for subsidising the chiefs and making them your police,—not to combine these two ideas in some other way, so as most efficiently to guard the frontier,—but abolish the treaties altogether and restore the old irresponsible commando system once again —

MR. EBDEN :—Pardon me! Not the “irresponsible commando system,” but the wise, humane, and enlightened policy of Sir Benjamin D’Urban,—to which, to use the words of your Excellency on another occasion, I do not believe that twenty persons in the whole colony would be found to be opposed —

MR. ROSS :—And which must be ultimately adopted!

MR. EBDEN :—And which must be ultimately adopted!

ATTORNEY-GENERAL :—Well, perhaps the good time is coming, but the fruit is not yet ripe. And remember, that even after Adelaide shall have been taken in, you must calculate upon Kafir depredations still, because you will still have a frontier which has cattle within it, and which will still have beyond it people who are fond of cattle. Until you shall have advanced your boundary to the interior, I do not see how cattle thefts are to be prevented by enclosing territory. If, then, such offences must come, the question is, whether the native tribes are to be treated with, as much as possible, in a peaceful way,—or whether they should be hunted like wolves, with coercion and commandos? Perhaps, under all these circumstances, it may be wiser to bear the ills we have than rush on others that we know not of. And, for my own part,—much as I deplore the extent to which depredations have been lately carried, and sincerely as I should rejoice in any measures which should prevent those depredations and punish the depredators,—I cannot suffer myself to be frightened out of my

wits by the state of the border, or conclude that, in that quarter chaos is come again, and life and property are equally unsafe, so long as I see the purchase price of farms, lying in the midst of all the mischief, steadily advancing. When I hear of losses of cattle,—of native foreigners in arms,—and of the impossibility of preserving anything from the audacity of those incorrigible thieves,—I do not shut my ears to the remonstrances of the sufferers ; but when I hear, also, that that very property will bring far more money at this very moment than it ever did before, I cannot feel that the evil is one of that absolutely ruinous description which some persons, with natural and excusable exaggerations, are in the habit of representing. Passing, now, to the question of Emigration and Public Works, I have, in connection with the latter, to express the pleasure with which I heard the remark of my hon. friend the Secretary to Government. It is a good principle to help those who help themselves. If I understood my hon. friend correctly, his idea is, that in future no grant should be made for any branch road unless the public or parties interested shall come forward with an equal amount. That this announcement will prove a stimulant to local energy, I confidently trust ; and in connexion with it I would remark, with reference to the rivalry between Du Toit's Kloof and Mostert's Hoek, that an idea is entertained of endeavouring to open Mostert's Hoek without resorting to the principle of assessment ; and that in that case, my next Road Bill will be confined to providing for a good road over the Cape Downs and a good road to Koeberg, leaving the opening of Du Toit's Kloof to be separately considered as a Worcester question. For the two roads which I have just mentioned, I would fondly hope that such a contribution might be afforded by the general revenue as will render the proposed assessment by no means onerous. I have now reached the last of the points adverted to by my hon. friend (the Negro Fund.) My hon. friend opposite (Mr Ross) and my hon. friend the Secretary to Government, have so clearly discussed and settled the principal circumstances belonging to this matter, that I shall not attempt to add a word to their unanswerable statements. On one of the resolutions of my hon. friend, which seems to raise

what is, in some degree, a legal question, I may be pardoned for saying a few words. He denies the right of the Secretary of State to authorize the application of any part of the colonial revenue without the vote of this Council. And, undoubtedly, if the House of Commons and this Council are to be considered as analogous bodies, he is right; for the sanction of the representatives of the people is essential to every application of their money. If, then, Lord Ripon's despatch of 1831 created this Council a House of Commons in regard to all financial questions, there should have been a vote of this Council to authorize the expenditure incurred by introducing the Negroes from St. Helena. But we must, here, be careful to distinguish. The money granted by the House of Commons is the money of the people. Money bills are their own making, and that exclusively. The Lords may not alter a money bill, the Crown may not alter it. No power must meddle with it but that of the people's house. Such is the revenue of England. What is the revenue of this Colony?

Mr. EBDEN :—The money of the people.

The ATTORNEY-GENERAL :—In one sense it is. But I am speaking as a lawyer, and as a lawyer I say that it is not the money of the people, but Her Majesty's revenue in this colony. Do we not remember that when the Secretary of State censured this Council for voting £1,000 to Col. Smith, he distinctly told them that they had made too free with "Her Majesty's revenue in this colony?" I quote the words from memory, but I believe that I quote correctly. If this revenue, then, is Her Majesty's revenue, what are you? "Well beloved" of Her Majesty every one;—"trusty," all of you, to the last degree; but, nevertheless appointed only to watch over the Queen's purse, and see that her servants do not cheat her. The money is not your money. It is the money of Her Majesty. You are authorized to audit the accounts; but as she may do what she likes with her own, her orders, relative to the application of any portion of her own revenue, are ample vouchers for whatever money she directs to be laid out; and

it is impossible to argue that the vote of this Council is a legal condition binding upon Her Majesty acting through her Secretary of State. These hints are offered as food for thought ; and, having ventured them I have only to say respecting the £3,600 which is lodged in the Cape of Good Hope—no, not in the Cape of Good Hope, but in the South African—Bank, and which my hon. friend thinks should not be there, but in the Treasury, that what my hon. friend opposite (Mr Ross) has stated is perfectly correct ; that that money has nothing whatever to do with the St. Helena importation ; and that you might just as well demand the fixed deposits of A. B. or C. D. lying in the bank, as a sum circumstanced like that in question. But, again, I think the Secretary to Government is quite right in expressing his willingness to accept this money. If it be offered he will by no means refuse it, and farther than this he cannot go ; for to demand the assignment of the fund as a matter of right would outrage, at once, every principle of common sense, common law, and common justice. I have now, Sir, brought to a close my desultory observations ; and I have only to express my hope that they have exhibited that degree of good humour with which I promised that they should be characterized ; and that, although totally unpremeditated, they may not be such as I shall be called upon, after reflection, to retract. If, however, I should unintentionally have gone astray, I shall not be backward to acknowledge that I have been wrong, and to read my recantation.

ON PAPER CURRENCY.

[*Legislative Council, June 21, 1843.*]

ATTORNEY-GENERAL :—It may be proper to mention in corroboration of what the Secretary to Government has said, that the series of twelve resolutions proposed to this Council by my then honourable—

and still, in the best sense of the word, honourable—friend (Mr. Craig) on the 3rd of July, 1841, and adopted by the Council, having for their object the grappling with this paper money question—have all received the approval of Her Majesty's Government. It will be recollected that the principle of those resolutions was this :—Issue, first, Government notes. Find out gradually and gently how much Government paper money, convertible at pleasure at the will of the holder, the necessities of the colony will absorb. Do not press or force its circulation. But if the colony, owing to peculiar circumstances, agricultural, physical, and commercial, will derive advantage from, and thus spontaneously resort to, an issue of notes to a certain amount, then you are, to that amount, relieved from the necessity of raising bullion to withdraw the old Government promissory notes. But we also contemplated that there would be a considerable amount of the paper debt which the necessities of the colony would not absorb, in the shape of a new paper money ; and it was proposed to issue, secondly, debentures to that amount ; and further, to borrow upon similar debentures such a sum of money as would secure the convertibility of the new paper issue. The majority of this Council considered that by the plan of issuing a convertible money there would be a large amount of debt, varying from £50,000 to £100,000, saved to the Government, and that the plan would, at the same time, furnish an important convenience to the public by facilitating remittances. These resolutions,—to which my hon. friend near me (Mr. Ebdon) was opposed,—were carried by a large majority, and with his counter resolutions, proposing to issue debentures at once for the whole amount of the existing paper debt,—went home to Her Majesty's Government. Under these circumstances Her Majesty's Government have approved, throughout, of the plan of this Council, and not of the plan of my hon. friend. The anticipated advantage to be derived from, in part, redeeming the old paper debt by an issue of another description of notes, my hon. friend considers to be a mere phantom ; but I can only say that many men—not of the same sagacity, perhaps, as my hon. friend, for I know no man of the same sagacity in business—but many men in business, I should say nine-tenths of them, in

this place, are with the Council in opinion, and against him. Yet the minority, I am aware, is frequently right, and the multitude prone to error; and all, therefore, that the Government can do is to attempt to keep a certain amount of these notes in circulation, taking care at the same time to hold a sufficient sum in hand to render them instantly convertible. And if we find that they return as fast as they are issued,—that, in fact, the plan when tried is found wanting, then the only course will be to abandon the project and take the whole debt up on debentures. It will thus be clear enough that the plan cannot be legitimately assailed except on the assumption that the revenue of the colony, which is the thing for this Council to conserve, will not be better off, but worse, by issuing, if the colony wants it, £50,000 of paper, whereby an equivalent amount of the colonial debt will be as effectually cancelled as if such an amount of the notes now in the Commissariat chest were put into the fire.

MR. EBDEN :—I deny the proposition.

ATTORNEY GENERAL :—My proposition is, that it is cheaper to borrow £100,000 in specie upon debentures than to borrow £150,000, inasmuch as I thereby gain at all events the interest of £50,000. This my hon. friend denies, and holds that debentures should at once be issued for the whole existing debt. To the law, then, and to the testimony. If, on trial, it be found that the plan proposed by this Council is not practicable, it will be time to adopt the other measure. But at present I am fully impressed that the most desirable course is, to issue notes to such an amount as can be easily kept in circulation; and I pledge my small financial reputation upon the opinion that such notes, to the amount of not less than £50,000, will be absorbed by the commercial necessities of the colony. As this is a legal subject, I may, perhaps, state how my mind is affected by it. I must say that I do not at present see either the necessity or expediency of coming to this Council for any Ordinance connected with the intended paper issue. There are now three banks that issue paper money, and neither of them has an Ordinance for the purpose. There can be no necessity for an Ordinance authorising the issue of notes con-

vertible at pleasure ; and the only way in which I can conceive an Ordinance necessary would be, if it were proposed to issue notes for smaller sums than £3 15s od., there being a law which forbids the issue of smaller notes than notes for that amount. The question of legal tender is quite a distinct matter. The only hardship that could here arise would be, were an attempt made to make that a legal tender which was not convertible at pleasure. But, as I have said, the Government fully recognize the necessity of keeping these notes convertible. Undertaking this obligation, the Government desire for these notes no adventitious aid whatever, believing that they will, in public estimation, support themselves. The question, however, of a legal tender is a legal question, and while the Government will not, I imagine, dream of coming to this Council for an Ordinance upon the subject, the point of law, if there be one, must still remain open to such parties as choose to raise it. Whether, in the absence of positive enactment, such notes as we now contemplate would be a legal tender, may be argued in court by whom it shall concern. We are not in a situation to determine this question, and I am not here to judge the judges. My hon. friend has referred to a judicial decision in which it was held that the present paper money was a legal tender,—that is, was a mode of payment which, if refused by the creditor when offered by the debtor, would throw upon the former the costs of action brought. This was decided of a paper money convertible, not directly in the yard below, but through the medium of Treasury Bills payable in London,—a circuitous mode of converting into gold, but still a mode of so converting. The judges after solemn argument ruled, as I understand (I was not then in the colony) that the old Dutch six-dollar notes were a legal tender. My hon. friend may ask me if I see my way through this judgment. Certainly, without great consideration, I would not venture to impugn it. The judgment went, I am informed, upon the ground that the Colonial Government would have the prerogative of making anything money which they issued as money. With my English notions, I was, at first, rather startled by such a doctrine, for in England, if I am not mistaken,—while the Crown

possesses the prerogative of affixing to money its value and denomination,—the Crown can only make money by its prerogative of the precious metals, gold and silver. It is only of these metals that, by common law, the Prerogative can make money which shall be a legal tender. But though the prerogative is limited in England, Parliament is not. Parliament can make anything money,—old rags, or what is the same thing, bits of paper. The latter was done in Pitt's time by the bank restriction, and during that restriction, and while the notes were not convertible at all, no plaintiff could arrest a defendant for debt unless he negatived, in the affidavit to hold to bail, a tender of the sum due in Bank of England notes. Parliament possesses what has been boldly called omnipotence, and according to Coke, can do everything but make a man a woman. Now prerogative, in England, where there is a Parliament, is one thing, and prerogative in a Crown colony like his, is quite another thing. When the paper money which the present paper money represents was issued, the Government of his colony was both executive and legislative; in other words, it possessed the powers of the Crown and the Parliament combined, and therefore may be well argued to have possessed the power of making its paper money a legal tender. Probably it was upon some such reasoning as this that the court proceeded in the case referred to by my hon. friend. If so, it is not reasoning which would extend to a paper money issued now, when the legislative functions have been separated from the executive, and delegated to this Council. But confined to the case which was actually before the court, I should be disposed to consider it as satisfactory; although, I confess, that when I first heard of the decision I did not clearly see my way as to its principle.

ON THE JUDGES' EXEMPTION FROM TAXATION.

[*Legislative Council, July 22, 1843.*]

ATTORNEY-GENERAL :—It is but justice to my hon. friend opposite (Mr. Ross) to express my conviction that, in anything which he has said to-day, he had no ill-feeling whatever to the collector of taxes. He is probably as well disposed towards the collector of taxes as any other member of this Council. But my hon. friend has long been laudably desirous to get these arrears of taxes collected, as far as they can be collected,—and written off as a bad debt when it is found that you can collect no more. Differing from the collector of taxes as to the best mode of attaining the end in view, he has been constrained, by his sense of public duty, to declare the grounds of that difference. He imputes to the collector no bad motive in the world. It is not because he loves Cæsar less,—for he has, I know, a regard for Mr. Rogerson,—but because he loves Rome more, that he acts as he does, for the sake of the Colonial Treasury. Some of his remarks, no doubt, did seem to involve a certain degree of censure of the collector of taxes, a censure, by-the-bye, which has not yet been proved to be deserved. I have pleasure in bearing testimony to the integrity and zeal of Mr. Canstatt ; and I concur with the Secretary to Government in thinking that it would, upon the whole, have been more expedient in the case of Mr Canstatt to have accepted his offer to allow his commission to be withheld until he had completed his engagement, and, with that security for diligence, have thrown open to the sub-collector the whole field which was to be reaped, taking care not to give him his hire until he had satisfied me that he had made it impossible for any one coming after him to glean a single sheaf. Mr. Rogerson reasoned differently. Men, he considered, are but men, and the sub-collector, if enabled to skim the cream of the whole dish, would be under a temptation

just to skim the cream and go no deeper. The large debts which, generally speaking, are due by the most solvent men, might be collected, and the smaller amounts, for collecting which the commission could never compensate, might be left uncollected. When all the remunerated work had been performed, the sub-collector might protest that he had already exhausted four-and-twenty pairs of boots, and that no amount of leather could make more of it,—and so ask for his commission, and be done with the whole thing. To guard against such a contingency, the collector of taxes,—acting upon not a bad general principle, but one scarcely applicable with such a man as Mr. Canstatt,—gave out his lists district by district, and required evidence that each list had been exhausted before he gave another. By this means it appeared to him, that the expectation of every fresh list would operate as a stimulus to the collector of the old one, and keep the sub-collector on his metal. But enough of this and let it pass. As one of the members of Council who was present on a former day, when the return adverted to by the Secretary to Government was laid on the table, I have now to express my concurrence in all that my hon. friend has stated, and to declare that the judges, in bringing the terms of that return under the notice of your Excellency, acted with justness and propriety. The expressions that they noticed were certainly ambiguous, and appear to bear a construction very injurious to the judicial character of the functionaries to whom they relate. To suppose, however, that there was in the mind of any one, any intention to show to any of the judges the slightest disrespect, would be alike idle and unjust; and I have no doubt that the clear and manly explanation given by the Secretary to Government will be considered ample and satisfactory in the quarter to which it was directed. I may remark that, after bestowing as much consideration as I was able to afford upon the point which two of the judges made, I came to a clear and strong opinion that the point thus made was not tenable. That opinion, and the grounds of it, I submitted at greater length than was, perhaps, required, for the consideration of your Excellency. That opinion I have seen no reason to modify or change. But I am not disposed to dogmatize upon the subject, or to maintain that the question is not

arguable, and still less am I disposed to withhold the expression of my belief that the judges referred to, in claiming a right to deduct from their annual salaries the amount of whatever annual interest they were under an obligation to pay upon their debts, and to pay income tax only on the balance, were governed by no other motive than a desire to take the benefit of the law as they conscientiously considered it to stand. As the Secretary to Government has said, only two of the judges made the point. That is quite true, and in stating it, the Secretary to Government had no intention whatever of making any distinction invidious towards the other judges. We are not in a situation to say that the third judge dissented from his brethren ; or that, being placed in equal circumstances, he waived the point on which they insisted. On a former occasion I expressed my sense of the character and merits of Mr Justice Kekewich. But I cannot, upon any evidence now before this Council, claim for him, in addition to his other merits, the very great merit (for such I should, of course, consider it) of agreeing in opinion with myself. Whether or not Mr. Kekewich is in the happy condition of owing no man anything, we cannot tell, but I have some reason to think, from what I have heard, that our excellent friend is not subjected to those quarterly or half-yearly calls which people subjected to payment of their six per cent. are obliged to bear ; and if this should really be the state of things, he would not have possessed the only ground on which his brethren claimed to be exempted. More I need not say, except to repeat, first, my conviction that the two judges in question will be perfectly satisfied with the explanation given,—for the one of them who happens to be now present (the Chief Justice), I can speak with confidence ;—and secondly, my conviction, that if ever the point should be brought judicially before them, they will decide it as they shall be impelled to do by a sense of duty. To say that those judges are proved by the extract from their letter which has been read to have abandoned their previous opinions, would be, of course, unwarrantable ; and therefore it is possible that some defendant may raise the point with me. Should that be the case, I shall rely upon the candour of the bench

for a fair hearing, which I am certain to receive ; and should I be defeated, which I will anticipate, I shall look to your Excellency for assistance in enabling me to take the opinion of the Cock Pit.

ON THE DUTCH REFORMED CHURCH ORDINANCE.

[*Legislative Council, July 22, 1843.*]

THE ATTORNEY-GENERAL said :—I wish to state, by the direction of His Excellency the Governor, the course which is intended to be pursued relative to a matter of considerable public interest and importance. I allude to the rules and regulations of the Dutch Reformed Church. The Council is aware that the Reverend the Synod of that large and respectable denomination have expended much time and labour in framing a code of laws more adapted to the present circumstances of the church and the colony, than those comprised in the Church Ordinance of Commissioner-General De Mist, and that they have sent in to Government the voluminous result of their protracted deliberations. These have received that attention to which they were entitled ; but, without entering just now upon the subject, I wish merely to observe, that His Excellency is advised that an Ordinance of this Council will be the most expedient mode of arranging the several important points involved ; and that such an Ordinance, based upon principles which will, it is to be hoped, be universally considered sound and just, will be prepared forthwith, and be laid upon the table for the necessary publication. For this purpose, and anxious to avoid delay, I should respectfully suggest that Council shall adjourn till Monday, the 31st inst., at which time I shall be prepared with a draft of the proposed measure, and shall take an opportunity of explaining its leading principles.

Council adjourned accordingly till Monday next, the 31st inst..

ON THE DUTCH REFORMED CHURCH BILL.

[*Legislative Council, July 31, 1843.*]

The ATTORNEY-GENERAL said :—In pursuance, Sir, of the notice which I gave at the last meeting of Council, I have now to lay upon the table for publication, an Ordinance for the better regulation of the ecclesiastical affairs of this Colony. In order that the bill, which is very brief, may be fully understood, I shall trespass upon the Council by making some remarks explanatory of the principles upon which it is based ; and if there be anything in this short piece of legislation which calls for extended argument, I shall defer the necessary discussion until the second reading. But in order that no obscurity may hang over the subject, and that the draft in the *Gazette* may be read with the assistance of whatever light I can cast upon its main provisions, I think it right to state distinctly what it is, and what it proposes to do. It will be in the recollection of your Excellency, and of every member of this Council, that when Commissioner-General De Mist was sent out to this colony by the then Batavian Government, he was authorized to supersede the Governor in regard to the function of making laws ; and that he was invested with ample powers which, as far as my information reaches, he exercised in a manner creditable to himself and greatly for the benefit of the community. He regulated the Orphan Chamber ; he provided for other important public institutions ; and amongst the other subjects which required his attention, he proceeded to provide for the ecclesiastical concerns of the colony, and accordingly promulgated, on the 25th July, 1804, the Church Regulations which I now hold in my hand. To read them, or any of them, would be both tedious and unnecessary ; but it may be safely said,—it will, indeed, be obvious to the most cursory perusal,—that while, in all probability, well suited to the condition of things in

1804, and in accordance with the paternal—perhaps rather too paternal—character of the Government of that day, they yet contain, amongst some principles both sound and just, a number of provisions which have long been obsolete because they have been long totally inapplicable. My eye is this moment caught by the fifth article, which broadly declares that all religious teachers are obliged in their public and private instructions to submit to the decrees of the Government in reference thereto ! Now, it so happens that it has not been the wont of the Governor of this colony,—and the bare idea of such an interference would be wholly repugnant to your Excellency's principles—and disposition, to dictate to any minister of religion the manner or terms in which he shall declare his Master's message ; and any such dictation, if attempted, would be justly felt to be an insult to the spirit of the age, an outrage upon the religious liberty of the people, and a grievance which could not, and which would not, be endured. Other instances of a similar nature could readily be adduced, but it would be unpardonable to consume the public time in proving what no one that I am aware of seriously calls in question. It is proper to observe that in his first chapter, the Commissioner treats generally and without distinction of all the religious communities or denominations within the colony; and having settled certain principles for their common rule and government, he proceeds, in his second chapter, to provide with great particularity for the chief church of the colony, the Dutch Reformed. Both classes of legislation are alike inapplicable ; and then the question arises,—how are they to be got rid of ? For the purpose of determining this point, it is necessary to consider the nature of those Church Regulations, and the legal character which they wear. If they be merely the offspring of the Executive Government, an Ordinance of this Council cannot be necessary for their repeal. In that case, regulations which profess to guide and govern the various religious denominations throughout the colony, and, amongst the rest, the Dutch Reformed Church, could be altered by your Excellency in your executive capacity as readily as those which guide and govern the clerks in the Colonial Office. But it is impossible, in my opinion, to view this instrument in such

a light. Commissioner-General De Mist combined in his own person both executive authority and legislative functions ; and whatever he promulgated as a law is as much a law as any Ordinance, now-a-days, of the Governor and Council. Considering the constitution of the colony in 1804, I should say that the Church Order of De Mist is as much a law, and in the same sense a law, as any other piece of local legislation to be found upon the Statute Book prior to the capitulation. If this observation be well founded, it will follow that, as the legislative function is now divided between the Governor and this Council, the proper, if not indispensable, mode of repealing the regulations of De Mist is by an Ordinance of this Council. I am of opinion that your Excellency could not, by affixing your name to a set of new regulations and publishing them as the code of the Dutch Reformed Church, get rid of the old law. I am equally of opinion that the sanction of the Secretary of State bestowed upon the new rules would be alike inoperative. Whatever the legislative power has established, the legislative power must abrogate ; and it therefore appears to me that the Ordinance of De Mist demands for its abrogation another Ordinance. We shall now, Sir, consider it to be established that the old church regulations are inapplicable to the times, and that their repeal is to be the work of this Council as contra-distinguished from the work of the Colonial Government. But simply to repeal will not be enough. Having made a clear stage, you must introduce new characters. When one set of regulations has been removed, provision must be made for the introduction of another to take their place. This point the bill provides for. And with the reference to the mode in which such provision is made, I will only say that, although I cannot be certain that it will obtain the unanimous concurrence of this Council, I do hope that it will do so, and I shall feel disappointed if it do not. The principle on which I propose that you should act is very simple. No one, surely, who considers the present state of religion in this colony, who considers what a church is, and is at all acquainted with the nature of the Dutch Reformed Church, will hesitate to admit the general principle, that every church and

denomination should be free to frame for itself the regulations by which its own internal affairs shall be ruled and governed. This is the principle with which I start. If any one thinks that principle a bad one, I call upon him to state a better. If the Dutch Reformed Church is not to regulate its own internal affairs, some other power must regulate them, and, in this colony, there are I conceive but two other quarters in which church laws could be made,—one the Executive Government,—and the other, this Council. Now I submit with confidence to your Excellency, and to every man who hears me, that it is beside the purpose and out of the province of the Executive Government, and alien altogether to the duties of us who are, to use a term a good deal animadverted upon lately, mere “sciolists in theology,” to sit down in order to determine what shall be the doctrines professed by the Dutch Reformed Church, or what shall be her discipline for maintaining practical religion and sound morality amongst her members. These are things with which the Executive Government as such has no concern; and in my opinion this Council,—legislating for the civil rights and secular interests of the community at large,—is just as little bound, and just as little qualified, to undertake the delicate duty now in question, as the Executive itself. Well, then, if we must have Church Regulations, and if it be true that the Government should not make them, some other body must be allowed to make them; and here, again, I submit with confidence, that, looking to the condition of the colony, to the reason of the thing, and to the principles and feelings of the Dutch Reformed Church, the body to which belongs naturally, properly, and of right, the power and the duty of framing regulations for that church, is and can be none other than its General Assembly or Synod. I see that my hon. friend (the Auditor-General) smiles at my mention of the Synod. I have pronounced, it may be,

A name unmusical to Volscian ears,
And harsh in sound to his,—

but I should hope not, for my hon. friend is himself a member of the church, and he will agree with me that although you may

be a very good man, and a very good subject,—aye, and a very good Christian too, without attaching any consequence to such an assembly as a Synod ; yet that to be a sound and consistent Presbyterian without so doing, is impossible. The gradation of Church Courts with the Synod at their head is the essence of Presbyterianism. In the rise from Consistories to Presbyteries, and from Presbyteries to Synods,—each being composed in certain proportions of the clergy and the laity,—lies the Presbyterian idea of a true church, and a true apostolical succession, for, be they right or be they wrong, Presbyterians do claim for their form of church government a clear apostolical descent. Here it is that Presbyterianism differs from Episcopalianism upon the one hand and Independency upon the other. But we shall not discuss these things. It is part of my argument and part of my plan, that such discussions should be kept out of this room ; but this much is clear, that if the Reformed Church of this colony be a Presbyterian Church, its Synod or General Assembly is a natural if not an essential part of its existence, and is the supreme court for determining all questions connected with its doctrine, its discipline, and its government. I am uttering no novelties. My excellent and much respected friend, General Bell, in an official communication to the Synod, bearing date January 7th, 1840, uses these words :—“ His Excellency, so far from desiring to lessen the authority of the church in its internal management, is, in reality, most anxious to free it from the trammels of secular interference in all spiritual or purely ecclesiastical matters.” Adopting this sentiment which, though uttered in 1840, has not yet grown stale, I wish to leave all such matters to the legislation of the Synod, and then the question arises, how far can it be trusted ? When we propose to get rid of the necessity of considering here the five points of Calvin, and the five hundred other such points which the proper regulation of the church would call upon us to consider, points upon which Dr. Chalmers maintains that we are and must be mere “sciolists,” it becomes us to see, and guard against, the dangers, if any, which are to be apprehended, and to provide against all possibility of an abuse of the powers which we intend to dele-

gate. Churchmen are notoriously fond of power, at least we often hear so, and churchmen are very much given to intermeddle with affairs which are other people's business, and not theirs, and so it is indispensable to provide proper checks to keep churchmen in good order. Grant all this, and let us see the quarters in which the Synod of the Dutch Reformed Church could have any pretext whatever for overstepping their legitimate authority. Those quarters are two in number, and but two—human ingenuity cannot make more of them. They will interfere, it may be said, with the rights of Government, and interfere, also, with the rights of the people. At present, some men may say, we have that security for good ecclesiastical regulation which is afforded by the responsibility of the duly constituted Government and Legislature of the colony. With the General Assembly we are not so secured. Under these circumstances, don't hand matters over to the tender mercies of that body until you have provided against every description of abuse. Well, Sir, we are willing to do what is desired. The Synod is quite willing to have it done. Let us, therefore, see, in the first place, what rights has Government in connexion with the Dutch Reformed Church? Till we have fixed what these are we can't defend them. We must catch the hare before we can cook it. The Government, I conceive, has only two rights to be preserved, one the power of the purse, the other the privilege of presenting ministers. I grant fully that the synod can pass no estimates affecting the public revenue, nor will my hon. friend beside me (the Treasurer-General) act upon any warrant signed even by the moderator. The synod, believe me, has no such notion. But I propose to place this point beyond all question or controversy by declaring, in the spirit of Commissioner De Mist, that all contributions out of the public revenue, in favour of any religious denomination whatever, are purely voluntary and gratuitous,—and, as such, exclusively under the disposition and control of Government, and revocable at Her Majesty's will and pleasure. Do this, and the power of the purse is effectually guarded. What then remains? Why, a right of which the exercise agitates all in Scotland,—but one which in this colony rests upon a different

footing, and is not the subject of dispute,—the right of patronage. The Governor of this colony now presents to all the vacant congregations of the Dutch Reformed Church. He does so, I presume, in virtue of salary which the Colonial Government bestows. Be that as it may, it is proposed to declare, not merely that the synod shall have no power over the public revenue, but also that the Governor for the time being shall possess,—and exercise in whatever manner he shall think best,—the right of appointing to vacancies in the church. When these things are done,—when the assembly is restricted from all interference, as of right, with the public purse, and from all power of excluding ministers properly presented, what more has Government to ask? Let any man who can, point out any other weak point in order that it also may be guarded. I believe there is none such. The law, when declared in the manner which I have suggested, will be clear and unambiguous, and will place all the rights of Government which the synod could ever have thought of touching beyond all chance of danger or approach. Now, then, for the people's rights and their perpetual preservation. These also I propose to guard. "Your Ordinance," it may be said, "protects the rights of Government, a thing natural enough when an Attorney-General of the Government draws it; but how are the rights of the laity, civil and religious, to be protected from aggression?" I ask, in reply, what it is that is required? Of what nature are the dangers to which the lay members of the church are liable? I can, for the life of me, muster up but three, and we shall take them in their order. The first which I shall notice is connected with the purity and preservation of the church itself. "We are Presbyterians, we hold to its existing discipline, to its existing government, to the Heidelberg Catechism, and to the other authorities which constitute, together with the Bible, the standards of the Dutch Reformed Church. How do we know but that, some fine day or other, the General Assembly, swayed by a spirit of innovation, or influenced by an Episcopalian Executive Government, may be pleased to declare the Church to be Episcopalian, and to make your friend, Mr. Faure, or your friend, Dr. Robertson, the

first Bishop?" The peril is not imminent. But I propose to make it impossible, by providing that the Dutch Reformed Church shall be and remain a Presbyterian Church, governed by Consistories, Presbyteries, and a General Assembly, and professing the doctrines contained in her present formulas of faith, and that these things no law, rule, or regulation of the Assembly shall have any power to alter or affect. We thus stifle any cry of "Church in danger," a cry which could have no manner of meaning in the case; for it is just as likely that Table Mountain will take a jump into Table Bay, as that the Dutch Reformed Church will ever forsake its place or principles. Still, however, it is not unseemly, when we are about to recognize a new and separate religious Legislature, to record the fact that their powers are not unlimited, and that, amongst other things, they do not extend over the constitution of the church, or enable them to alter the essential features of either its discipline or doctrine. A provision to this effect has accordingly been introduced into the bill. The second of the three incitements to alarm which I have imagined regards the sanctions by which church laws are to be enforced. "Under cover of religion," it may be urged, "laws will be made affecting my civil rights. Some man is alleged to have broken the seventh or some other commandment, and thereupon I am summoned to give evidence before the Church Judicatory. What if I don't choose to go? Is the law of the assembly to send me to gaol? Or, if I be, myself, involved in some charge of scandal, am I to be condemned by the church court in costs? and if so, how am I to be forced to pay?" Now here again, we shall take care to give the amplest possible protection. The regulations of the church do not demand, and will not receive, any temporal sanction whatsoever. It is proposed to declare that no rule or regulation which may, at any time, be made by the General Assembly shall have any direct or intrinsic power to affect the person or the property of any individual; that such rules and regulations shall be regarded by the civil courts in like manner as the rules and regulations of a merely voluntary association, and that they can only come to affect civil rights through the operation of the common law, when they have

been subscribed to or adopted in such a manner as to render any particular provision which they may contain, involving a civil obligation, binding and effectual in the way of an express or implied contract. A section embodying these principles forms part of the proposed Ordinance. The General Assembly, therefore, can touch no man's person by any of its rules, nor take any man's money, except his who has agreed to pay it. Limited in this way, why, I ask, may not the church establish such regulations as it thinks proper? Every society in the world has an inherent right to prescribe its own conditions of membership, its own rules and regulations, and the penalties for all transgressions. All people who agree to these conditions are bound by these conditions. This is a principle of all voluntary societies from the highest to the lowest, and it would be monstrous to deny to a Christian church what you will grant to a convivial club. I mean no disrespect to the Dutch Reformed Church, quite the reverse, but in a legal point of view I should regard her rules and regulations as I would the rules and regulations of the South African Club. If this society forms its laws, and provides that every member who spits in a certain room shall forfeit sixpence, and every member smoking in a certain other room shall pay a shilling, then, if these laws are voluntarily adopted, and afterwards the party so adopting them spits or smokes in the forbidden place, I am of opinion that an action lies, because that party has, in fact, entered into a contract and has broken that contract. Many rules and regulations of the Dutch Reformed, and every other church, may bind individuals upon the principle just illustrated. But here is no interference with civil rights. Far from it. It is merely allowing men to enter voluntarily into such engagements as they think proper, and holding them to their engagements. It is merely saying that the laws of the church, or some of them, may be so framed and so adopted as to amount to an express obligation to pay a certain sum of money written out at full length, and signed with the party's name. I have now adverted to two of the points on which it is intended to protect the people's rights. But, in truth, it is next to farcical to talk of such protection, or to deem such protection necessary to be

given. Be well assured that the rights of the laity are quite as safe with the synod, constituted as it is, and as it always must be, as with either of the councils belonging to the Government of this colony, in one of which there is not a single member of the Dutch Reformed Church, and in the other but a small minority. Still what we propose to do will do no harm, and in addition to what I have already explained, one other point remains to be secured. It is expedient, indeed essential, that the influence of the laity should always make itself felt in the supreme church court, and that no degree of clerical management should ever be able to alter the proportions of ministers and elders of which the General Assembly is now composed; and in order to secure this object I propose to enact that a number of laymen, equal to the number of clergymen, should at all times be lawfully empowered to sit, deliberate, and vote, upon every question submitted for the consideration of the church. Now, when the public purse has been protected; when the Governor's patronage has been preserved; when the discipline and doctrine of the church have been established; when civil rights have been removed beyond the reach of any aggression; and when the balance of lay and clerical power in the assembly has been fixed for ever, how is it possible for the church to go astray? What is left for the synod except the free and unrestricted power of legislating, within the limits prescribed, for its own internal government, the power of doing that for themselves which nobody but themselves can do as it should be done? Judging from the nature of the remarks which I have offered, it might appear that the most convenient course to be adopted would have been to repeal the regulations of De Mist, determine the points upon which the synod should not have power to innovate,—and then leave that reverend body to frame and promulgate, whenever it should think proper so to do, its code of discipline. And were the synod now assembled, or were it speedily to meet again, such, unquestionably, is the course which I should have recommended. But your Excellency is aware that the late synod laboured long and anxiously in the work of ecclesiastical legislation, and produced a comprehensive body of rules which, under the impression that it would in some way or

other receive the necessary sanction, they sent in to Government ; and under those circumstances, and knowing as we do the mind of the church upon the subject, I think we ought not to postpone, for nearly four years, the enjoyment of the advantages which the result of the labour and learning of the synod promises to secure to the members of the church. The truth is, that new regulations are urgently required. I therefore propose that we should receive the rules and regulations as framed by the assembly, and setting them out in a schedule to the present Ordinance, declare them to be the rules and regulations, for the time being, of the Dutch Reformed Church, giving the synod full power, from time to time, to add to, alter, or annul them, as it should consider necessary. By this means the large, influential, and respectable denomination of which I speak, will obtain the benefit of immediate legislation, and that legislation will be, in fact, though not in form, the legislation of the church itself. It is right to observe that, of the rules and regulations as originally transmitted by the synod, a few have been struck out. The excluded clauses had reference to money matters, and were shaped in a manner which seemed somewhat inconsistent with the principle upon which pecuniary assistance is to be given by Government, as that principle has already been explained. But the synod never meant, in those omitted regulations, to claim any inherent power over the public revenue. So far from it, that they carefully appended to all these monetary clauses a reference to the article of De Mist from which they were taken, in order to show that they recognized, in the matter, the unlimited authority of Government,—and that they only introduced those provisions into their code, because it was considered that that code, when duly sanctioned, would wholly supersede De Mist's church order, and because it would, therefore, become necessary to let the matters in question take the same place in the new regulations which they had occupied in the old. It is not intended, assuredly not, to withdraw from that great school for grown up children, the Dutch Reformed Church, the aid which it has hitherto, received from Government. Everything will, of course, go on,

as formerly. But as the principle of absolute independence in regard to that aid is proposed to be kept up in the case of the Dutch Reformed Church, as in that of every other religious denomination in the colony, and as the application of that principle would render it inconvenient to introduce pecuniary details, either into the Ordinance of this Council, or the regulations of the church, I should suggest that a Government advertisement might properly be issued, concurrently with the promulgation of whatever Ordinance may be passed, reciting that the repeal of De Mist's regulations had rendered it expedient to publish, for general information, the nature and the amount of the pecuniary assistance hitherto granted by Government, and still proposed to be continued, to the Dutch Reformed Church in this colony. Any intimation of the description now adverted to would supply the place of some of the matters mentioned by De Mist, and would be sufficient to enable the church to draw up any of her own domestic rules and regulations which may chance to be dependent upon the nature and amount of the aid which she has reason to expect from Government. By adopting the course suggested, you will, as it appears to me, consult the convenience both of the Government and the church. Repeal the unsuitable regulations of De Mist, declare anew certain of their sound and just principles, leave the assembly, under some restrictions, to frame its own laws, and announce, in a Government advertisement, the nature and amount of the pecuniary contribution which it is contemplated to continue, and matters will, I conceive, be placed upon their proper footing. The Civil Government and the church will each have their peculiar rights and functions, and there cannot well arise any difficulty or dispute. Political commissioners will cease to attend at the meetings of the synod. For to what useful end would you perpetuate an institution of which the original and only purpose will have altogether ceased? Why send commissioners to protect rights which, by law, cannot be assailed? It does appear to me that to persevere in the course of appointing political commissioners could serve no earthly end whatever, except to provoke, or at least give room for, controversy and unpleasantness. I refer, unwillingly,

to by-gone disagreements. But it is notorious that differences of opinion have before now excited a degree of warmth in the synod, which, considering the character and functions of the parties engaged, we should not unnecessarily risk again. Of the political commissioners I think and desire to speak with sincere respect. One gentleman who had acted in that capacity on several previous occasions, but who, at his own desire, was not appointed at the last meeting,—I mean Sir John Truter,—is probably one of the ablest men that this colony has produced. The character and standing of Messrs. Berrange and Denysen, entitle them also to great consideration. And I will say, that in undertaking duties altogether gratuitous, always laborious, often ungracious, impelled by a desire to serve the true interests of the church to which themselves and their families belong, they have acted in a manner which entitles them to the thanks of the public, the Government, and the church itself. In anything I have said, and in anything I have proposed, I shall be sadly misconceived if I am thought to have evinced a disposition to throw the political commissioners overboard, or to disparage their well intended efforts. Upon the other hand, justice requires that I should state my sentiments respecting the spirit and proceedings of the clergy. And I must declare, with sincerity and truth, that, whatever may be charged upon churchmen generally, however much they be said to be arrogant, obstinate, grasping, unreasonable, I have found nothing, in the course of my communications with the ministers of the Dutch Reformed Church relative to church matters, which was not characterized by an unaffected spirit of conciliation, and a willingness to agree to any measures which would allow the church peaceably and tranquilly to perform the work which is given her to do. Amongst these ministers I would have you send political commissioners no more. I do not know that the state and history of political commissionership in Scotland tend to exhibit the institution in a very attractive shape. Her Majesty deputed, now the Marquess of Breadalbane and now the Marquess of Bute, to be a symbol of her presence and protection to the General Assembly. And what, all the time, are the churchmen of the General Assembly doing? Why, Lord

Brougham declares that they are guilty of high treason, conspiring together to subvert and overturn the law and constitution of the land. Bad enough no doubt ; but still there sits Her Majesty's Lord High Commissioner, looking down upon the traitors, hearkening to their treason, giving his countenance to their deliberations, but not authorized or able, even were he so inclined, to stop or interfere with their treasonable proceedings. How the dignity of the Crown is consulted by sending the Queen's Representative to sit amidst a set of rampant theologians whom he can neither check nor control, may be discovered by Scottish ingenuity, but is totally beyond my Irish comprehension. But coming back to the bill which I now lay upon the table, I have again to express my hope that it will meet with the concurrence of the Council. I believe that its simple principles are sound principles ;—and I have the gratification of stating that my friend, the Rev. Mr. Faure, with whom I have talked the matter over, and who, I need not inform your Excellency, is a man of great weight and influence among his brethren of the Dutch Reformed Church, is of opinion that what I have proposed, with an anxious desire to meet the views of all reasonable men, will meet the full concurrence of the body to which he belongs. Under these circumstances, and if the church be content, I think this Council should be content also,—and that no one should hesitate to support a measure which proposes to place the affairs of a most important religious community upon a satisfactory foundation.

ON THE INSOLVENT LAW.

[*Legislative Council, July 31, 1843.*]

THE ATTORNEY-GENERAL begged to lay on the table for the perusal of members—and they were well worthy perusal—some papers containing observations relative to the Insolvent Law, which had

been received since the dissolution of the Insolvent Law Committee. One was a valuable report on the subject by the Master of the Supreme Court ; another he had obtained by personal solicitation from his intelligent friend, Mr. Eaton, who had had much experience in the administration of insolvent estates ; and, though last not least, were some observations by Mr. Justice Menzies addressed to His Excellency, with reference to the report of the Insolvent Law Committee. He considered it desirable that these papers should be generally circulated and read.

ON THE INSOLVENT LAW.

[*Legislative Council, September 4, 1843.*]

The ATTORNEY-GENERAL said :—In regard to the insolvent law, it appears to me that it would be perfectly unnecessary upon my part to enter now upon any general observations relative to the nature of the measure now before the Council ; because as such a measure necessarily involves a multifarious mass of various matters which would render it quite impossible, in one address, to do justice to the several topics therein embraced, nothing but confusion could arise from the attempt. And as the public are already pretty well aware, from the report of the committee, from the observations of Mr. Eaton, and the remarks of Mr. Justice Menzies and the Master, of the general merits of the question, I think it will be expedient to proceed to read the bill, clause by clause, when I shall take the opportunity of making such remarks as occur to me illustrative of such sections as seem to require defence or explanation. Having received, on Saturday last, in a printed shape, some additional observations by Mr. Justice Menzies, which his anxiety to promote the public interest induced him to throw off in the midst of his preparations for leaving town on circuit, I wish to have an opportunity of comparing those observations clause by clause with the draft Ordinance ; and having also been engaged for six hours

on Saturday with the committee of the Commercial Exchange, in going over various points well worthy of consideration, it appears to me that your Excellency and the Council may rest satisfied with reading to-day only the first and second clauses, relative to the *cessio bonorum*, and then adjourn for a few days. By that means I shall be prepared at the next meeting to say which of the suggestions of Mr. Justice Menzies I should wish this Council to adopt, and which of them there seems to be good reason for rejecting. Having before us the suggestions of so able a man as the learned judge unquestionably is, your Excellency will doubtless agree with me that we should not proceed to legislate on the subject without taking every advantage of his views. My idea, therefore, is, that we should simply read the first and second sections, and adjourn. [After reading the clauses, the learned gentleman proceeded] :— Your Excellency and the Council will perceive by the preamble of the bill and the first section that the *cessio bonorum* is proposed to be abolished. With reference to this, the last printed notes of Mr. Justice Menzies speak as follows :—

“ Before the benefit of the *cessio bonorum* is abolished, some grounds for doing so should be established. What prejudicial consequences have resulted from its existence? It has not been abolished in Scotland, although a Bankrupt Act has long formed part of the law of that country. It was in force in this colony at the same time that the office of sequestrator existed. I am of opinion that it would be much better if many of the small estates which are now surrendered and placed under sequestration, were administered and distributed by the creditors under a *cessio bonorum*, than by the machinery of the Ordinance No. 64.”

Now I quite concur with the learned judge, that before the *cessio bonorum*, or any other part of the law, is abolished, some grounds for doing so should be established ; and in this instance that ground will, I think, be very easily established. Let us see, then, what the *cessio bonorum* is. We shall refer, first, to the principle of the thing, and afterwards to the degree in which it is recognized in England and in Scotland, the analogy of Scotland being especially referred to by the learned judge. The *cessio bonorum* was originally,

it is presumed, a benefit or favour, introduced into the Roman Law, so long ago as the time of Julius Cæsar, being intended by that eminent conqueror, orator, and jurist, for the purpose of relieving the democratic party—(not that I attribute the learned judge's predilection for the *cessio bonorum* to any democratic bias whatever)—and the object was, to mitigate the previous rigour of the law which condemned the debtor who could not pay to perpetual imprisonment. It was meant in favour of personal liberty, and in order that the debtor who had honestly become unable to pay his debts, and to whom the creditor could not justly impute fraud, should not be everlastingly lost to society for the purpose of glutting the vindictiveness of his prosecutor. The principle of the boon was, that the debtor should cede to his creditors all his property, and that he should then receive from the judge a protection from arrest. Turning to England, we find that the common law of that country did not permit a freeman to be imprisoned for debt; but that, partly by statute, and partly by judicial determination, it afterwards came to pass that the person of the debtor might, in almost all actions, be taken for his debt, and committed to what was, in theory at least, perpetual incarceration. When commerce began to rise upon the ruins of the feudal system, after the discovery of printing, and the agitation of the Reformation, it was found that the old system would not suit the new circumstances; and accordingly, in the reign of Henry VIII, the first English Bankrupt Act was passed. But the operation of the bankrupt system has always been restricted to traders and dealers, with regard to whom the object has been to obtain for the creditor the largest dividend which the estate can yield, and to allow the debtor to get his discharge, in order to apply his industry afresh, and begin the world again. It so happens, however, that until the reign of George II, no provision was made by law for the relief from imprisonment of that large class of persons who were excluded from the operation of the bankrupt laws; namely, persons not in trade, and traders of a petty sort. In that reign a measure was introduced and carried, which was the origin of the insolvent system of England; and which, with numerous additions and amendments, constitutes the

present law. This insolvent system is virtually the *cessio bonorum* of the civil law, was confessedly borrowed from it, and has the same leading incidents, namely, the surrender of all property, the refusal of any assistance to the fraudulent debtor, and the granting to the well-conducted debtor a personal protection, which still, however, leaves his after-acquired property available. Adverting now to Scotland, it must certainly be admitted that the sequestration system of that country did not operate so as to abolish the *cessio bonorum*, which continued in existence, and continues to this day. Scotland, it may be said, which, being economical, never gives two things where one will do, gives both the Sequestration Acts and the *cessio bonorum*; and why should you refuse to do the same? The reason is, because sequestration in Scotland is different in principle from the insolvent law of this colony. The learned judge often says from the bench that he has forgotten his old Scotch law; and I presume that he did not advert, when speaking of Scotland, to the fact that the sequestration of Scotland, resting upon the same principle as the bankrupt law of England, is confined to merchants and manufacturers. It is therefore clear that a remedy which, like the *cessio bonorum*, is general in its operation, and embraces debtors of every class, is not necessarily or naturally superseded by the sequestration system. Now, the insolvent law of this colony wants the great principle upon which the retention of the *cessio* in Scotland can be defended; for the insolvent law embraces equally every variety of debtor, whether he be engaged in trade or not. Under these circumstances, it appears to me to be inconsistent to have two perfectly concurrent remedies for the very same state of things. It is a rule in good philosophy—we need not quote Newton for its truth—never to have recourse to two modes of doing what one is sufficient to accomplish. If the *cessio bonorum* is a better system than an insolvent law, pass no insolvent law at all. If the insolvent law is a better system than the *cessio bonorum*, let the *cessio bonorum* sink. But the objection which I entertain to the continuance of the system of *cessio* does not rest upon such speculative reasoning. I have resorted for information and advice to persons practically acquainted with the working of the two systems,

and those persons, one and all, assure me that the insolvent system of working an insolvent estate, is believed by all creditors to be much more open, searching, safe, and satisfactory ; that the machinery for working the *cessio bonorum*, if it have anything that can be called such, is very little understood ; and that the result is supposed to be, that when a debtor applies for cession, it is the shortest way to take whatever he professes himself to be able to give, and give up the pursuit. Under these circumstances, upon which I shall not dwell, I submit that the Council can see no sufficient reason for continuing the *cessio*. An equivalent provision, however, is introduced into the draft, and made a part of the insolvent law. By the 101st section of the draft, an insolvent, whose estate has been administered under the Ordinance, may apply for a decree of court, declaring his person free of arrest, which, under the circumstances stated in the clause, the court shall be at liberty to grant or to withhold. By this means the *cessio bonorum* is not made the means of giving the Ordinance the go-by, coming into court with a petition, and having its merits disposed of before the creditors have the means of ascertaining deliberately or sufficiently the true condition of the estate. The debtor must pass through the ordeal of the sequestration. But when he has passed the ordeal unharmed, the court can make a decree which is, in fact, though not in form, the same as the *cessio bonorum*. It is not, as has this moment been suggested to me from behind, a change in the principle, but merely an alteration in the practice. For my own part, from some recent indications of a preference for the cession, as evinced by debtors generally, I suspect that if you retain that system, you will have few voluntary surrenders of estates,—parties being likely, in my opinion, to consider that, in that way, they can get through their difficulties with far greater ease.

[Legislative Council, September 4, 1843.]

On section 35 being read,

The ATTORNEY-GENERAL said :—As this is the first clause which

proposes to regulate the ranking of joint and separate debts, it will be necessary, in consequence of the position in which the matter stands before the Council, to explain briefly the nature of the question. Your Excellency sees that when a partnership is engaged in business, there will always, or almost always, be a partnership estate, in which all the partners are jointly interested, and a separate estate, belonging to each partner composing the firm. Now we frequently find that the same state of things which brings the partnership estate into insolvency, affects the separate estates of the partners as well, and renders them insolvent too. Then the question is, when you have got both the estates of the partnership, and the separate estates of the partners duly sequestrated, in what position do the two distinct classes of creditors stand with regard to each other, and to the two distinct funds? Upon this the systems of administration pursued and recommended are not uniform. Three principal rules have been adopted or proposed for the purpose of settling what should be done under the circumstances which I have stated. One of these rules is the English rule, the second rule is the Scotch rule, and the third rule is commonly called Christian's rule, by reason that it was first proposed by Mr. Christian, the writer of an able book on bankruptcy. The English rule determines that when a firm is bankrupt and its several members bankrupt too, you are to take the assets of the joint estate and divide them among the joint creditors as far as they will go, and then each joint creditor, in so far as he has not been paid out of the assets of the firm, is entitled to go against the separate assets of the partners. But while allowing him to resort to the separate assets, the law of England fixes the position in which he shall stand. It tells the joint creditor that when he comes to the separate estate of any partner he must make his bow, and stand altogether aside, until the separate creditors of that partner shall have received satisfaction, that if there be a surplus he has a right to share in that surplus, but that if there be not enough to satisfy in full the separate creditors, he must rest content with having exhausted the assets of the joint estate, and claim no share of the separate assets, which are to be devoted exclusively to the satisfaction of the

separate debts. Upon the other hand, the law of England will never allow the separate creditor of a partner to come into competition with the creditors of the firm in regard to the distribution of the assets of that firm. It is only after the company creditors have been paid in full that the separate creditors of any partner can come in for their share of any surplus of the joint estate which may be yielded to the partner whose creditors they are, upon the liquidation of the partnership estate. The Scottish rule differs from the English. It declares that when a company and the partners of that company are concurrently sequestrated, the creditors of the company shall first divide amongst them all the company's property. So far it agrees with the law of England. But it goes farther, and declares that after the company creditors have exhausted all the company's property, they are entitled to come in equally with the separate creditors of the partners for a share in the separate estate, in so far as they are left unsatisfied by the distribution of the insolvent estate. This, it will be perceived, gives the company creditor a great advantage. If a company fail for £100,000 with assets amounting to £50,000, or ten shillings in the pound, every company creditor may prove in concurrence and competition with the separate creditor of each separate partner for one-half of his original debt, and draw a dividend accordingly. I have thus explained, I hope distinctly, the English rule and the Scotch rule. The rule of Mr. Christian, which has certainly some apparent equity, and which seems to have captivated Mr. Justice Burton, who, in his work upon the insolvent law, obviously views it with an eye of favour, would provide that whenever the joint estate and the separate estates were concurrently insolvent, each partner should take over his proportion of the company's assets as his separate assets, and his proportion of the company's debts as his separate debts, add the assets so obtained to his other assets, and the debts so derived to his other debts, and then proceed to pay both sorts of debts out of both sorts of assets, without any distinction, as far as the fund will go. This rule, it is clear, is very different indeed from either the Scotch rule or the English. That

it presents some appearance of equity, I have already admitted. But I am saved the trouble of showing that the appearance is delusive, having the distinct authority of Mr. Justice Menzies for pronouncing its principle unsound; so that, no matter what other rule should be adopted, Mr. Christian's rule is out of the case. In his original observations upon the report of the committee of this Council, the learned judge expresses himself thus:—

“I am of opinion that Mr. Christian's rule of ranking is founded on no sound legal principle, but solely on a fancied ground of expediency which does not exist, because if adopted it would, as is most justly remarked by the committee, often, or rather constantly, in turn, work injustice to each class of creditors.”

Well, then, as time and breath need not be uselessly expended, I think we may throw aside Mr. Christian's rule altogether, and assume that the point to be determined is, whether the rule of England or the rule Scotland be the preferable. Mr. Menzies is strongly in favour of the Scotch. In another part of the same observations to which I have already adverted, the learned judge declares :—

“Were it not that the committee have stated that the English rule is, in their opinion, ‘founded upon a sound and equitable principle,’ I should have been led to conclude that the committee proposed the adoption of the English rule in this colony, *merely because it was the English rule*, and without regard to the principle upon which it was founded, or whether it was founded on any principle at all. And I cannot but regret that the committee have not more clearly set forth and defined the principle on which they have considered this branch of the English rule to be founded, and given their reasons for maintaining that it is calculated, in a majority of instances, to give to each body of creditors that particular fund with reference to which *they must be taken* to have dealt.”

Under these circumstances, it is fit to say that the point was much discussed by the committee (for I, myself, I remember had doubts upon the subject), and it was not until after due consideration, and communicating with mercantile men, that we came unanimously to the conclusion that the English rule was more equitable than

the Scotch. It was not chosen because it was the English rule, as the judge, by *italicising* his remark to that effect, obviously suspects. Not, Sir, but that, connected commercially as this colony is with England, an English rule upon a point of mercantile law has a strong recommendation in the mere fact that it is the English rule, because it is desirable that our correspondents in that country should as much as possible understand the laws under which we live, and by which their property coming here may be administered. And in so far as our commercial intercourse with America is concerned, the same sort of recommendation exists in the present case, in reference to the rule of ranking, which this Ordinance proposes. By an Act of Congress, of August 1841, which my friend the American Consul kindly sent to me to make whatever use of it I could (an Act, by the bye, of which, in these repudiating times, the title is extremely ominous, styled as it is—" *An Act to establish a Uniform System of Bankruptcy throughout the United States*),—provision is made for the same rule of ranking joint and separate debts as that which is embodied in the bill now before this Council. But I do not propose to rest the questions upon those presumptive proofs of equity. Let us put a case or two, and see how the respective rules would work. It is no uncommon thing anywhere,—and is well known in this colony,—for a merchant to carry on business separately in his own name, and for the same man to be a partner in a firm carrying on some other business. The firm of George Wilson Prince & Co., for instance, consists, or consisted, amongst others, of George Wilson Prince and Harrison Watson. Now we may suppose Harrison Watson to carry on business in his own name and on his separate account —

Mr. Ross :—Which he does.

ATTORNEY-GENERAL :—As a member of another firm he does so ; and he might, as readily, do so on his own separate account. Now in argument all things are supposable ; and I shall, therefore, make the not very probable supposition that George Wilson Prince & Co. were bankrupts, and that Harrison Watson was bankrupt as well. The English rule, under such circumstances, would say,—let Prince & Co.'s assets go to their creditors ; and Harrison Watson's

assets go to his creditors, and if there be in either estate a surplus, let the creditors of the other estate come in, but not otherwise. But if it so happened that Mr. Prince and Mr. Watson were caught up in some whirlwind,—which is unlikely, for both are, in every sense, substantial men,—and dropped in Glasgow, quite a different principle would be applied to the regulation of their estates. *There*, the creditors of Prince & Co. would first divide all Prince & Co.'s property, and then come in jointly with Mr. Watson's creditors to divide his property as well. Observe, Mr. Watson's creditors are never to divide any part of Prince & Co.'s property. That is all to go to the creditors of the firm. It is equitable, then, that the separate creditors of Watson, who have dealt with him in reference to his separate estate, are to have that separate estate laid open to Prince & Co.'s creditors, and to have their dividends diminished by the share which the strangers are to take? We say not. We say, "Give Prince & Co.'s creditors, if necessary, all Prince & Co.'s assets. Upon the other hand, give Harrison Watson's creditors, if necessary, all Harrison Watson's assets. If there be a surplus in either estate, give it to the deficient creditors of the other. But don't give to the company creditors an inequitable preference." I have stated the case in which the partner carries on trade on his separate account. We shall now suppose the case in which the partner carries on no separate trade, but yet has separate creditors, and see how the Scotch rule would work. Should then the Cape of Good Hope Bank become insolvent, which with my hon. friend (Mr. Ebdon) as its chairman, is very improbable, and I, as the holder of some shares, should become insolvent too, the creditors of the bank, after valuing their dividend out of its assets, would prove for their respective balances upon my estate in concurrence with, and it might be to the virtual exclusion of, my butcher, my baker, and all the other persons who have given me credit in my individual capacity. I think this is not right. I think the bank creditors have, in justice, no claim to be distinguished so advantageously. Let my separate creditors be first satisfied, and, if there be a surplus, let it go to make good as far as it will reach the engagements of the bank. But they have no right to come in com-

petition with my personal creditors. Upon the whole, it does appear to me that the principle of the English rule is not so very indefensible ; and that if there shall chance to be carried on the wings of the Press to the learned judge, as he is now enjoying the luxuries of circuit, some account of what I have been saying, it will prove a great additional gratification to him to find that something may, after all, be said in favour of a rule which appeared to him to rest upon no principle at all. But he is clearly right in his reasoning, up to a certain point. "Do you deny," he may ask, "that the creditors of a bankrupt company may come upon the partners of that company, the latter remaining solvent?" I deny no such thing. It is the law, and I admit that. "Why then," he will further ask, "should the bankruptcy of the separate estate vary either the principle or the liability?" Sir, it varies it, in my mind, just because the separate estates are bankrupt. So long as they remain unsequestered it must be held that they are solvent ; that there is enough for all ; that there is no conflict of creditors about the distribution of a deficient fund ; that all creditors, as well joint as separate, can be paid in full. But where the separate estates are actually surrendered a new state of things arises. You have, then, proof that there is a breaking up, that the estate is shipwrecked, and that the question comes to be, since all cannot be saved, who have a right to get first upon the plank. In other words, whether, when the creditors are in such a condition that one must be taken and the other left, you should not leave each description of estate to its own particular creditors. The learned judge in his late remarks considers that to adopt the rule embodied in the bill will be to repeal the existing law of the colony. It is probable that he is right in this opinion. But from the meagre way in which the title "society" is, for the most part, treated in such civil law books as I have consulted, I should hesitate myself to pronounce a decided judgment. Mr. Justice Burton evidently considers the point as not settled ; and I believe it may be asserted that we cannot point to any case which has happened in the colony in which the Scottish rule of ranking has been acted on. Be that, however, as it may, we can change the law if it seem fitting so

to do. And that it is fitting to make the law what the bill now before the Council proposes to make it, I have already advanced some reasons for believing. I shall now proceed to call a witness to give evidence upon the point ; and he shall be one above all exception, for he is a Scotchman, and not merely a Scotchman but a Scotch lawyer, and not merely a Scotch lawyer, but a most learned and liberal jurist, to whom the principles of different systems are familiar, and who is, probably, better qualified than any other writer who could be named to offer an opinion upon their respective merits. I allude to Mr. Bell, whose work upon commercial law is, perhaps, the most successful effort, in the way of legal literature, that has anywhere been made in the course of many years. I shall now read from his 2d volume, at page 662 of the 5th edition, his estimate of the Scottish rule of ranking, as contrasted with the English ; and I hope the passage will be transcribed for the consolation of the learned judge, who visibly considers that what we propose to do is a very mischievous and unjustifiable thing :—

“The Scottish rule, as already observed, seems to proceed correctly enough on the strict principles of law ; the English modelled on the principles of equity, seems to be more just and reasonable ; since persons frequently deal to a great extent as sole traders, and have credit accordingly, while they are altogether unknown as partners of a company. The Scottish rule seems more consistent with the policy of an age in which little capital is employed in trade, and in which all the facilities and encouragement for the investing of the funds of moneyed men in commercial speculations are highly beneficial ; the English more natural to a country which has made great advances in commerce, in which large capitals are freely embarked in all kinds of trading enterprise, and in which the necessity of encouraging this sort of investment is not sufficiently strong to pervert the natural suggestions of equity.”

Now, Sir, it may be very true that commerce in this colony has not reached that point that Mr. Bell alludes to in regard to England. But still there is not, surely, any temptation to encourage partner-

ships sufficiently strong to pervert, as the author says, the “natural suggestions of equity.” We propose to follow those natural suggestions. In doing so we shall, I think, do well ; for the more I have reflected upon the point, the more have I been convinced that in preferring the English rule of ranking joint and separate creditors to the rule which obtains in Scotland, we are laying down the just est principle, and that which ought to be established.

[*Legislative Council, September 11, 1843.*]

SEQUESTRATION OF JOINT AND SEPARATE ESTATES.

On the second section being read,

The ATTORNEY-GENERAL said, that it had been just suggested to him to give the Supreme and Circuit Courts the power of accepting the surrender of estates, and of ordering their sequestration. He therefore proposed to add the necessary words here, and elsewhere, for that purpose. He farther observed, that Mr. Justice Menzies was of opinion that the object of the proviso in this section relative to persons administering the estates of others who are absent from the colony, would be better answered by including them in section 3, together with persons administering the estates of persons legally or actually incapable of administering their own. He (the Attorney-General) could not concur in this. Such an arrangement would, he conceived, turn the agent of the absent man into the insolvent, which was not the intention. When the estate of a dead man was surrendered, who was the insolvent ? Not, certainly, the dead man but the living administrator. Inconveniences might result from accepting a surrender from the agent, as such agent, making him the insolvent, as if he were an executor or curator. The clause had first been drawn in the manner now recommended by the learned judge, but, in correcting the proofs, it had appeared advisable to place the matter on its present footing.

CREDITORS' LIABILITY FOR COSTS.

On section 8 being read,

The ATTORNEY-GENERAL pointed out the difference between this section and the corresponding section of Ordinance No. 64, and defended the several amendments. He had recently known of a case in which a man proved a debt of £60, got nothing at all, and was then compelled to contribute out of his pocket £4 to cover the trustee's remuneration. The present section would, he considered, place matters on a better footing. Mr. Justice Menzies had put the case of a trustee recovering a large dividend for the creditors, and then unsuccessfully attempting to recover more, and had asked why the creditors should not contribute, from what they had received, in order to remunerate the trustee for the trouble he had taken? This was an extreme case, and one not likely to occur. Every trustee deducted his remuneration on the face of his distribution account. And with regard to the unsuccessful trouble, the trustee should take care to be indemnified by some one or more amongst the creditors, before he took it.

ADMINISTRATION OF ESTATES.

On the 9th section being read,

The ATTORNEY-GENERAL proposed to add to this section the last sentence of section 37, and stated that he would, in deference to the suggestions of Mr. Justice Menzies, move at the proper time the omission of the remainder of section 37. The Attorney-General entered at some length into the subject of these changes, the purport of which can be gathered from his remarks upon the subject of ranking joint and separate debts. The result of his observations was, that whenever joint and separate estates were included in the same order for sequestration, they should be administered by the same trustees, who should be bound, at the same time, to keep separate accounts; that whenever the joint and any separate estates were sequestered by distinct orders, they should be administered throughout as perfectly unconnected.

COLLUSION WITH PETITIONING CREDITORS.

On the 20th section being read,

The ATTORNEY-GENERAL explained his reasons for not adopting some changes which had been suggested by Mr. Justice Menzies. The Attorney-General was of opinion that the clause as it stood would reach every collusive dealing between the petitioning creditor and the insolvent. If the consideration given by the latter to the former preceded the supercession of the order of sequestration, then the revival of the order would avoid it at once. And if it were given after the supercession, it would necessarily, upon the revival of the order, be an undue preference under the provisions of the section as they at present stood. He considered that the clause did not require any additional stringency.

PREFERENCE OF EXECUTION CREDITORS.

On section 22 being read,

THE ATTORNEY-GENERAL said :—This section differs, in a very important particular, from the section of Ordinance No. 64, to which, in general, it corresponds. It is the principle of the Roman Dutch Law, that a creditor, by actually laying on his attachment upon his debtor's property, obtains a special lien, known by the name of the pretorian hypothek, and becomes thereby preferent to every other mortgagee of movables, whether conventional or tacit. By Ordinance No. 64 this preference was secured to the creditor whenever the attachment had been laid on before the order for sequestration. The creditor, therefore, instead of losing anything by the sequestration, was rather benefited by it, because while his priority was fully conceded, other creditors who were coming forward with their writs, and who would by the Roman Dutch law have participated in the proceeds of the property attached, were stopped short by the sequestration, and obliged to leave the attaching creditor in full possession of the field. I see no sort of justice in this arrangement. And I see something worse in a sort of dealing which there is reason to fear is not unknown, and one which we cannot possibly be too anxious to discourage. I speak of the

case in which the debtor knows that he is about to break, and being desirous to favour his friend in the safest possible manner, gives him a liquid document to facilitate a provisional sentence, waits till the execution is laid on and the preference bestowed, and then surrenders. The law should not lead into such temptation. Between creditors who have respectively commenced a suit, recovered judgment, issued a writ, and laid on an attachment, the lines are difficult to draw ; and it is proposed to place them all upon the same footing, save only, that the attaching creditor is to have the costs of the execution which he was encouraged to lay on. The principle is not without a precedent, and seeing that it is reasonable in itself, that it will check collusion, and stop up one road to favouritism, I strongly recommend its adoption by the Council.

EFFECT OF ORDER OF SEQUESTRATION ON IMPRISONMENT.

Upon the 23rd section being read,

The ATTORNEY-GENERAL adverted to a just remark of Mr. Menzies, to the effect that a direction to discharge the insolvent from prison might lead to the discharge of a man in gaol for something else besides debt. This had been altered, and the nature of the imprisonment from which the insolvent might be discharged, more fully set forth. It would be competent for the court to discharge him, should it so think fit, from any imprisonment occasioned simply by non-payment of money.

The ATTORNEY-GENERAL entered into several explanations with reference to the remarks made by Mr. Justice Menzies on this section. He considered that when a party had been arrested in security of a debt, upon an apprehension that he was about to quit the colony, it was desirable that there should exist a power of discharging him. He was not aware whether or not Mr. Menzies had adverted to this case when framing his observations ; but as it was a case which had actually occurred here very lately, and might soon occur again, he conceived that some provision should be made. The proper provision was to lodge a discretionary power in the court.

VALUATION OF SECURITIES.

On section 30 being read,

The ATTORNEY-GENERAL moved its omission. It only related to rights of voting and not to amount of debt or dividend. In practice it might be found both invidious and difficult to estimate the value of collateral securities. The case of bills of exchange was one in point. The inconvenience of putting a value upon a given indorser's solvency was not counterbalanced by any sufficient benefit. He thought the whole section, which was borrowed from the last Sequestration Act for Scotland, might advantageously be expunged.

VOTES OF MORTGAGEES.

On section 31 being read,

The ATTORNEY-GENERAL said :—I have to propose an alteration in this section which requires to be explained. By the corresponding section of Ordinance No. 64, the mortgagee was left, so far as his debt was covered by the mortgage, without any voice in any of the deliberations of the creditors. This state of things was complained of, and, in my mind, not without justice. In nine cases out of ten the mortgagee exhausts the whole estate, and it is certainly a hardship that concurrent creditors who are to receive nothing, and who know that they are to receive nothing, should choose the trustee who sells the property to which the mortgagee must look, who takes possession of the mortgagee's money, and who, if he prove fraudulent or insolvent, will leave the mortgagee without remedy or redress. Feeling the force of these reasons, the committee recommended a middle course. The report is in favour of allowing mortgagees to vote for trustees in number, whether covered or not, but in value only for the estimated balance. In his first remarks upon the proceedings of the committee, Mr. Justice Menzies suggested that the change proposed by the committee would be very little felt, and considered that mortgagees should be permitted to vote both in number and value for the whole amount of the mortgage debt, whether covered or not. Agreeing at the time in the view of Mr. Menzies, I framed the clause as it stands, in accordance with his recommendation. I have since then communicated with the merchants upon the subject, and have been convinced by their reason-

ing that, in avoiding one evil, we are about to introduce another. We shall, I imagine, throw the choice of trustees, in most insolvent estates at this end of the colony, into the hands of a few capitalists, and there will not be, upon the part of the concurrent creditors, that degree of confidence that the estate is managed so as to show, if possible, some surplus, which it is desirable should exist. I feel the force of this objection. But I should not, I think, have yielded to it so far as to return to the plan of the committee, were it not for another alteration by which it will be accompanied. I speak now of the right of all parties who choose, to require security from any suspected trustee, a provision which I shall explain hereafter in its proper place. The mortgagee who disapproves of any trustee elected against his wishes, may demand security for his interest. With this protection he should be satisfied, and having furnished such a protection you may justly act upon the principle of the committee. By this means, and this means only, you will avoid opposite, but considerable evils. You will avoid the evil of allowing the mortgagee, who will be himself, taking his entire debt, a majority in value, to influence a few of the small fry amongst the concurrent creditors, and so carry every election. And you will also avoid the evil of compelling a mortgagee to trust his money into the hands of a man for whom he has not voted ; whose solvency or integrity he suspects, and yet from whom he is not empowered to require security. Cases have occurred in which trustees, under such circumstances, have not accounted. If it be said that the obligation to give security will be a great discouragement to the competition for the office of trustee, I answer, so much the better. No man has any right to come forward as a candidate for such an office, whose circumstances and character are such that he can neither give himself, nor get others to give for him, security that he will not make away with the money or other property entrusted to him.

TRUSTEES.

On the 42nd section being read,

The ATTORNEY-GENERAL said :—I have an addition to propose to the section which has just been read. But before I advert to

that addition, I deem it desirable, as this is the first section in which the trustees of the insolvent estate are distinctly introduced, to say a word or two upon the principle upon which, in regard to the choice of trustees, the Ordinance proceeds. It is matter of notoriety that a practice has, in this respect, grown up, which was not contemplated by the framers of Ordinance No. 64. It has been found, that as in England the parliamentary reporters have unexpectedly and illegitimately assumed the character of what has been called the fourth estate of the realm, so, in this colony, insolvent trustees have unexpectedly and illegitimately come to form a distinct and important third legal profession. We have the advocate, we have the attorney, and we have the professional trustee. The primary intention of Ordinance 64 was, to introduce, in reference to trustees, the principle that prevails in England ; and in England, although it is competent to choose an assignee who is not a creditor, yet in practice such a choice is never heard of. In that country, creditors invariably choose creditors. The original object was, that in this colony creditors should choose creditors in the same way. But they have not done so. On the contrary, in nineteen cases out of every twenty, at least at this end of the colony, a trustee is elected who has no interest in the insolvent estate, and who merely desires the office as a certain species of remunerative employment. Under these circumstances, two questions naturally arise ; the one, whether our colonial system is a better system or a worse system than that pursued in England ; and the other, whether, even if it be a worse system, it is expedient for this Council to interpose against it ? These questions, you perceive, are quite distinct, and should be separately determined. For my own part, I should be against interference, although I should be of opinion that the present practice was injurious. The Legislature would overstep its province by forcing trustees upon creditors, or refusing to receive the trustees whom creditors elect. But that the colonial system is, upon the whole, a worse system than the English, I greatly doubt. In one respect, and that not unimportant, it seems to be entitled to a preference : for it is much less expensive. This assertion may strike you as

strange, since the colonial trustee receives remuneration, whilst the English serves quite gratuitously. But just because the English assignee serves thus gratuitously, he takes little personal trouble, but surrenders the whole management of the estate into the hands of the solicitor, and although the assignee charges nothing, the solicitor proceeds upon quite another principle, charging for everything he does, and charging, too, right well.

MR. EBDEN :—He receives no commission —

ATTORNEY-GENERAL :—Certainly he receives no commission, but what of that? He receives his bill of costs. A host of minor items soon swell up to a large sum ; and when the attorney sits down to draw his bill, illustrating, curiously, the infinite divisibility of business, and marshalling six and eight pences and thirteen and four pences in interminable array, it is very well if he do not end by sweeping the whole of the assets into his pocket. The assignee cannot be blamed for this. He is not paid, and therefore conceives himself exonerated from the duty of doing the business which he commits to the conduct of the solicitor. But it is not merely because the assignee is not paid that he does not work. In general he would not know how to set about his work, even if he were paid. The division of labour is favourable to proficiency in skill, and practice gives expertness. A creditor without any experience in such matters is unfitted, even if he be prepared to give up the necessary time, to conduct with advantage much of that peculiar sort of business which every trustee finds it necessary to transact. Creditors of a certain rank and standing cannot sacrifice the necessary time ; and creditors of inferior rank and standing cannot furnish the necessary ability. Much that the professional trustee does in this colony without any separate charge, is invariably done in England by the solicitor, who puts down in detail every particle of business done, and speedily mounts up a bill of costs beside which the remuneration of the professional trustee, given in the lump, would seem the merest trifle. The professional trustee labours at what he has to do, because it is his profession, and because he must hope to succeed in his profession by the means through which every other professional

man succeeds, industry, activity, ability, zeal for the interest of those who have already employed him, and whose continued support he is desirous to secure ; while at the same time, devoting himself to one pursuit, he gradually attains superior knowledge, and is totally removed from the reach of that temptation by which a creditor, whose interest may not be the same with that of the creditors at large, is not unfrequently beset. Influenced by such considerations, I am, for my own part, not unfriendly to the system of professional trustees. And even if I were hostile to it, I should, as I have already intimated, be indisposed to legislate against it. It is kindly suggested to me, from behind, that there is, perhaps, another course which might be taken : that we might conjoin an official trustee with a creditor's trustee in every estate, and thus attempt to secure some opposite advantages. This suggestion is the more deserving of attention because the principle involved in it has recently received the sanction of the English Legislature. By the Act of the 1st and 2nd William IV., chap. 56, the Chancellor is empowered to nominate thirty official assignees, one of whom it is made imperative to conjoin with the assignees elected by the creditors of every bankrupt estate. How that provision has worked in England I do not know. That it would not work well in this colony, I shall not venture to pronounce. But my feeling is against it. I have no doubt that it would be charged by the public with creating every evil experienced however inevitable, and with preventing every good anticipated however extravagant. Mr. Justice Menzies says, as will be seen, that the proneness of the people of this colony to misconceive the meaning of Ordinances is altogether inconceivable except by those who know them. Now I know them well enough to know that they are just as prone to misconceive your own meaning when you kindly step in to do better for them than they can do for themselves ; and I have no doubt whatever, that every set of disappointed creditors, and creditors upon insolvent estates, will be disappointed to the end of the chapter, would be found ready to trace to the official trustee their diminished dividend, and to show how much more they would have got but for the supineness or

incapacity of a class of officers established merely to bestow patronage in some quarter or other, at the expense of creditors in general. I do not give these opinions as being unalterably fixed. There is high authority the other way. My friend, the Master, you will have perceived, inclines to the plan of official trustees. The head of the Supreme Court, I find, is also favourable to having the plan maturely discussed before its absolute rejection. But being sceptical as to the fact that official trustees would do better than professional trustees, and being impressed with the conviction that, although they actually should do better, they would be generally believed to do worse, I am for continuing matters on their present footing, leaving the choice of the creditors unfettered ; and only labouring to secure, as much as possible, the integrity of the election. In justice to our third profession, and in aid of the remarks which I have thrown out, I shall call the attention of the Council to a very sensible passage in the Commentaries of Mr. Bell. In treating of the sort of trustees whom it will be expedient for the creditors to select, that able writer introduces the following observations :—

“ In general, it is most advisable for creditors to choose, or for a debtor to select as trustee, a professional accountant, or one who devotes himself to this department of practice. The attention of such a man is directed to the correct conduct of a trustee's administration, as a part of the professional character on which he is to depend, and both the debtor and the creditors will have the trust more effectually conducted, and with less of those suspicions which so often disturb the management of trust estates, where an individual is selected unaccustomed to this occupation, and having frequently no other recommendation but that which should operate the other way, namely, his own interest as a creditor on the estate. In this country we have a set of professional accountants, possessing a degree of intelligence and knowledge, and a respectability of character, scarcely ever, perhaps, equalled in any unincorporated body of professional men. The regularity of conduct, the clearness of accounts, the perfect system of administration, according to which

these gentlemen manage their trusts, afford an admirable instrument in the arrangement of insolvent estates ; and although improper men will thrust themselves into an employment for which they are unfit, it is seldom that any case of breach of trust has been brought into public notice."—2, *Bell's Com.*, 603, 5th ed.

It appears to me that these remarks of Mr. Bell go strongly to fortify the observations which I have submitted to the Council. It has seemed to me the more necessary to make those observations because the professional trustees, as we have christened them, are often spoken of with a degree of distrust, which I think they do not merit. In my professional capacity I have, of necessity, some knowledge of the manner in which they transact their business ; and it is but justice so say that, as a body, they discover zeal and assiduity, and an anxiety to realize as much as possible for the creditors at large. I am, therefore, for confining ourselves to the evils connected with the manner of election. In the section next but one some underhand and improper practices are specified and punished. And another and a most important change is introduced into the present section ; namely, the right of the minority of creditors to demand security. The majority which elects the trustee needs no protection. He is their own agent, and they may, if they think proper, make it a condition of their support that he shall give them security for the due administration of the estate. With the majority, therefore, we have nothing to do. But the case of the minority is different. To force a man to give his money to another in whom he may have no confidence, whom at all events he does not vote for, without enabling him to obtain security that he will ever get his money back again, is certainly a hardship. I have, therefore, inserted a clause empowering all creditors who have not voted for the trustee elected, to call for security to the satisfaction of the Master or resident magistrate, as the case may be, for whatever interest those creditors may have in the due administration of the insolvent estate. With this salutary provision, which was suggested to me by my hon. friend opposite (Mr. Ross), I do not see how any creditor can have just reason to complain. Should he lose for want of security he must blame himself for not requiring it.

Mr. Ross :—You state here that the trustees must not exceed three in number. I should like to know how that will operate with regard to trust companies ?

ATTORNEY-GENERAL :—They can act according to their ordinances.

Mr. Ross :—But they have, or at least one has, no ordinance yet. We have never been able to get one. And I am clearly of opinion that a company is the best trustee that creditors can choose.

ATTORNEY GENERAL. — For ought I know that may be. But the number of trustees must be limited, or you will have a Babel and not a board. Let the trust companies act through their secretaries. Why not appoint Mr. De Wet of one association, and Mr. Eaton of another ? And if there be a desire to give ground for public confidence, and set the public quite at ease about security, nothing can be simpler than to announce authoritatively that the capital stock of such or such a company is responsible for the due administration of all insolvent estates of which their secretary shall be chosen trustee. But you can never leave the number of trustees totally unlimited.

Mr. EBDEN :—With reference to this section I would ask whether the mortgagee in this colony might not be allowed, like the mortgagee in England, the selling of his own property ?

ATTORNEY-GENERAL :—The mortgagee in England differs materially from the mortgagee in this colony. A mortgage of real or immovable property in England has all the forms, and many of the effects, of an absolute sale. The English mortgage deed is a complete conveyance of the estate, with a clause of redemption in case the money is paid. The legal title, the complete *dominium*, is carried out of the mortgagor and conveyed to the mortgagee. Under these circumstances, the bankruptcy of the mortgagor in no degree affect the interest of the mortgagee, who, if he be covered, stands aloof from the bankruptcy altogether. The assignees may redeem the mortgage if the creditors shall so think fit. But if not, the mortgagee may hold his mortgage, and choose his own time for realizing his money, returning, of course, to the bankrupt estate any surplus which the mortgaged property may yield

over and above the mortgage debt and interest. In this colony the principle is different. The mortgagee does not obtain the *dominium* of the property, which is never taken out of the mortgagor. The former is merely a registered encumbrance upon property which still remains the property of the insolvent, which is still as much his as any other portion of his assets, and which must be realized through the same administration as that which realizes the rest of the estate. By virtue of his registered mortgage the mortgagee becomes a preferent creditor, but there may be tacit hypothecs upon the property, and priorities cannot be determined in such a manner as to allow the mortgagee to seize at once upon the proceeds of the mortgaged property. In a letter published in a late number of the *Advertiser*, and signed "A Sufferer under Ordinance No. 64" (a title which, if so many suffer as is said to be the case, does not individualize with any great distinctness), it is proposed that the mortgagee should be empowered to offer to the other creditors to take over the hypothecated property in satisfaction of the debt, and that if the creditors should resolve to decline this offer, and a sale should be the consequence, the said creditors should be obliged to make good, not merely the costs of the sale, but the difference between the debt and the proceeds of that sale, in case the purchase money proved inadequate. I do not see that the mortgagee is to pay anything in case the sale should realize a surplus. But I cannot accede to the principle involved. We must beware of jobbing. Our mortgagees are men of heavy metal, and by a little arrangement meetings may be packed for the purpose of giving mortgagees great bargains, and allowing properties to be taken over which might have realized considerably; for it is just the property which should, from its value, be exposed for sale, that there would be the most anxiety to except in satisfaction of the debt. I conceive that the concurrent creditors have a right to try their chance of a surplus by the only unerring test—a public sale. At that sale the mortgagee may buy in, if he thinks proper. But I am, certainly, opposed to any arrangement by which a little manœuvring would constantly have the effect of depriving the insolvent estate of that which it was fairly and righteously entitled to possess.

[*Legislative Council, September 13, 1843.*]

LEGAL CAPACITY OF UNCERTIFICATED INSOLVENTS.

On the 48th section being read,

The ATTORNEY-GENERAL said:—A very important alteration of the law is involved in this section, which it may be desirable to explain in order that its policy may be clearly understood. By the law as it now stands the whole property of the insolvent, as well that which he possesses at the time of the sequestration as any which may in any manner come to him during the sequestration, passes to the trustee ; and, in legal signification, the sequestration lasts until the insolvent obtains his certificate. This period may be months, may be years ; may, in fact, never be accomplished, since the insolvent may die uncertificated ; and a moment's reflection will convince any man that very inconvenient results are likely to arise from considering the insolvent, so long as he remains without his certificate, as a mere channel or conduit pipe for conveying to another party (who very often knows nothing of his proceedings) everything of which he acquires the apparent ownership. The Colonial Ordinance No. 64, is identical, in this respect, with the Bankrupt Act of England : for the verbal differences are too minute and unimportant to merit notice. At home the inconveniences referred to have been strongly felt. The law has operated in some cases to facilitate too much the granting of the certificate ; and in other cases has tended to cast dishonest difficulties in the way. When a creditor of one description is told that by refusing a certificate the bankrupt will be kept for ever in a state of absolute incapacity, he is moved to sign in favour of a man who does not deserve to receive so ready a discharge. When a creditor of another description knows that by refusing to sign, even for a deserving man, he may be able to squeeze out, from some person or other, some indirect consideration, he will be induced to trade upon the destitution in which he has it in his power to continue the

bankrupt, and seek to sell his suffrage. But the inconveniences are not confined to the condition of the bankrupt himself. They are largely partaken by the public in general who have dealings with the bankrupt. The English decisions upon this head are far, indeed, from being uniform and consistent. But some points are clear. It is clear, for instance, that, as against his assignee, the uncertificated bankrupt can hold no property. The bankrupt of to-day, if he dismount in Cheapside twenty years hence, may see his assignee mount into the saddle and ride off with the horse, and if he had not his certificate, can make no legal resistance whatsoever. The hardship here, if hardship there really be, is one of no great moment. But it is when the bankrupt enters into dealings with third parties that the inconvenience is principally felt. This inconvenience is apparent even through the distressing inconsistency of the English decisions. The general rule has been that the bankrupt, although he can hold no property as against his assignee, can maintain his right to property against all the world beside, his assignee not interfering. He might sue upon a contract made with him since his bankruptcy. He might recover for goods sold by him since the same period. He could confer a good title to negotiable securities passing through his hands in the course of new transactions. In such cases it seemed to be established that parties sued by the bankrupt could not set up title in the assignee, and thus defeat the action, unless the assignee had required the money to be paid to him. This doctrine appears to have been shaken. According to Mr. Commissioner Law (whose separate report on bankruptcy I got out from England, together with some other parliamentary papers which I considered likely to be of service), a very recent case has decided that the action of the uncertificated bankrupt may be defeated by setting up title in assignees who do not interfere. The learned Commissioner thus states the substance of the decision to which I now refer :—

“And even when the assignees of the bankrupt do not interfere, when after twenty years his old creditors have ceased to trouble him and had forgotten his existence, this most fraudulent law authorises any person, who by present dealings with him has come

to owe him money, to set up the bankruptcy in defiance of an honest demand ; to proclaim the title of the assignees, though never applied to by, and never intending to pay them."—*Young vs. Rushworth, Adolphus & Ellis*, 470.

Similar questions have arisen in this colony. The case of "*Stretch vs. Campbell*," in the Supreme Court, in which I was one of the counsel, may be mentioned by way of illustration. The circumstances were these. A man of the name of Osmond, an uncertificated insolvent, whose estate had been for some years under sequestration, entered into a partnership upon the frontier, with Campbell, the defendant. These parties continued together in business for some time, and carried on, if I remember rightly, a very considerable trade. At the dissolution of the partnership, Campell appeared to owe Osmond a certain balance, which he settled by passing promissory notes payable to Osmond or his order. One of those promissory notes Osmond endorsed for value to Stretch, the plaintiff, who keeps a store in Uitenhage. Campbell, when sued by Stretch for the amount of this note, pleaded that Osmond was an uncertificated insolvent, that the title to endorse was in the trustee, Mr. Harries, of Port Elizabeth, I think, and that Osmond's endorsement consequently conveyed no title. The large and comprehensive language by which Ordinance No. 64 deprives the insolvent of all future property of every sort and description whatsoever, and vests it absolutely in the trustee, was certainly a plausible foundation for this defence. The court, however, overuled it. But the judges, as it appeared to me, were not unanimous with regard to the general principle involved ; for, while a majority of the court would, I conceive, have affirmed, if necessary, the general proposition that the insolvent might have property as against strangers, his trustee not interfering (a proposition in accordance with what was then considered, both by the bench and bar, to be the English principle), Mr. Menzies, founding himself upon some verbal difference between the English Act and the Colonial Ordinance, was prepared, I imagine, to withhold his assent to so general a doctrine. This general doctrine it was unnecessary to decide. Upon the reason of the thing and the analogy of the English case of "*Drayton vs. Dale*," in

2nd Barnwall and Creswell, their lordships unanimously held, that whatever might be the legal incapacities of an uncertificated insolvent, yet that a man who, upon the face of a negotiable instrument, promised to pay to the insolvent's order, had thereby precluded himself from saying that the insolvent had no power to make that order. The judgment went, it will be perceived, upon the special circumstances of the case. Quite another judgment might consistently have been pronounced in a case in which it appeared that Mr. Osmond had obtained a horse after his sequestration, which horse some neighbour took possession of and refused to resign. Whether the court, in such a case, or in a case in which it appeared that Osmond had sold the horse and brought his action for the price, would have sustained or dismissed the suit, treating Mr. Harries or Mr. Osmond as the legal owner of the horse, I am not in a position positively to determine. Such a case would be clearly distinguishable from "*Stretch vs. Campbell*," inasmuch as it would want the very ground, that of express authority bestowed, on which alone the latter case proceeded. For my own part, I look upon it as a hardship that when a debt is due, the demand reasonable, the consideration honest, a party shall stand up, who never has been called upon by the trustees and who never means to pay them, and say to the plaintiff, "You must be nonsuited, for although true it is you are the man I dealt with, nay over and over again engaged to pay, still, in point of law, I must be taken to have dealt, not with you, but with your trustees, parties with whom I have had no communication, and whom I have never seen!" But this is not all. When the trustees do not interfere the law encourages roguery in third parties, and when the trustees do interfere the same law encourages something like roguery in themselves. In the appendix of evidence attached to the general report of the bankruptcy commissioners of 1841, I find the following case detailed in the testimony of Mr. Lewis, an attorney in great practice in bankruptcy :—

"A party had been bankrupt at Liverpool. He did not obtain his certificate. He came to London and his friends set him up at a public house in the Whitechapel-road, where he remained some

time, and contracted debts to the amount of £2,600. Finding that his business did not answer, and that he had within £100 of what he owed, he contracted to sell the business to Messieurs Meux, the brewers, and on the day on which the purchase was to have been completed the assignee of the uncertificated bankrupt came in, by virtue of his office, and seized the whole of the property. The result was that the party who had, at that time, nearly sufficient to pay all his new creditors twenty shillings in the pound has been deprived of the whole of that property, and it has gone to pay the creditors who refused to give him a certificate; and the new creditors who had trusted him without a knowledge of the bankruptcy are deprived of the whole of the assets."—*Appendix*, p. 156.

Here is the statement of a case not put by way of illustration; not shewing what might be done under the present system in England; but exhibiting what actually has been done, to the knowledge of the witness, in a very recent instance. The same thing might be done in this colony. Such a thing should not, in my opinion, be done anywhere; and in attempting to correct the evil the first thing to be done is, to trace that evil to its source. That source, as it appears to me, is the inconvenient extent of the period during which the law considers the uncertificated insolvent a mere nonentity. In seeking to give everything to the creditors which a man acquires during a period of which the length depends upon the creditors themselves, you seek to give them what they can after all but seldom get, what those creditors still more seldom get who deserve to get it (for it is the supine or the tricky who will lie by to let the insolvent acquire, and then step forward to seize), and what you cannot seek to give without entailing serious evils upon the public generally. Curtail the period in which the insolvent acquires directly for his trustee and for him alone, and you will get rid of the principle out of which the inconvenience arises. Upon the other hand, to vest in the trustee barely such property as was vested in the insolvent at the time of the making of the order for sequestration, might unduly confine the rights of creditors, and furnish a facility for fraudulent concealment. If you can find some intermediate epoch, some point at which the estate

of the insolvent has been thoroughly investigated and fully collected for distribution, you should vest in the trustee everything belonging to the insolvent up to that epoch ; but leave him afterwards free to acquire the legal dominion of all future property. Such an epoch exists in the filing of the account and plan of distribution, which, generally speaking, takes place within six months of the insolvency. After the filing of that account the immediate title of the trustee is extinguished, and the insolvent, although uncertificated, should be at liberty to commence trade again, and by exerting his industry endeavour to retrieve his fortunes. I need not pause to point out how such a modification as that which is now suggested must have the effect of relieving us from most of the embarrassments which we now experience. Instead of a continuance of total disqualification which may last for a long life, you have a period much more limited, but still, for practical purposes, of ample extent. It is not proposed, of course, that without a certificate the insolvent should get a discharge from debt. I explained, upon a former day, the principle of the English insolvent law, the *cessio bonorum* of that country, and the manner of its operation. By that law all the rights and interests of the insolvent rest in the assignee down to the date of the discharge from custody. After that the insolvent may try his chance and begin the world again. But it is an indispensable condition of that discharge that the insolvent should sign a warrant of attorney to confess a judgment in favour of the assignee, upon which judgment, by leave of the Insolvent Court, execution may issue whenever the judge is satisfied, on affidavit or otherwise, that the insolvent has acquired the means of satisfying, wholly or in part, his unsatisfied debts. This is the principle which we propose to introduce instead of the principle of the English bankrupt law which now regulates the practice in the colony. I apprehend the principle is not a new one here. The old Sequestrator of the Dutch law only took, I believe, the debtor's present property ; and although there was machinery provided by which future property might be made available for old debts, the *dominium*, the absolute ownership of that future property, remained in the debtor until some machinery was

put in motion. In Scotland, in the same manner, future property does not pass to the trustee, and the common course in which creditors obtain satisfaction out of it, is by applying for a supplemental sequestration. By this means both Holland and Scotland seem to have avoided the difficulties experienced by the bankrupt system of England, without, I imagine, depriving creditors, characterized by common vigilance, of any substantial benefit. We propose in like manner to avoid those difficulties. The Ordinance provides hereafter for the mode of making future property available for old debts, so long as the insolvent continues uncertificated. By acceding to the arrangement thus proposed, you will, I conceive, give to the creditors everything that they can reasonably expect, and at the same time protect the public from the very serious mischiefs which I have already pointed out as being necessarily attendant upon the present system.

AUDITOR-GENERAL :—As far as I have been able to understand the Attorney-General, it strikes me that the proposed amendment is calculated to favour concealment upon the part of the insolvent to a greater extent than exists at present. If you limit yourselves to any stated period, I should think that the insolvent could always find ways and means to conceal his property till he got out of the power of his creditors.

MR. HENDRIK CLOETE :—It is only intended to limit the title of the trustee. The creditors are at liberty to take his property in another way.

MR. ROSS :—There was no one part of the law more discussed in the committee than that now before the Council. It is absolutely necessary to appoint some time for discharging the trustee, and I maintain that we cannot do better than to let the insolvent begin again, and allow the creditors to follow him in conjunction with such new creditors as may afterwards give him credit.

ATTORNEY-GENERAL :—A word or two will, I think, obviate the objection of the Auditor-General. Observe, the law will still give to the trustee everything belonging to the insolvent at the time of the sequestration, whether freely given up or fraudulently concealed. Observe, farther, that the law will still give to the

trustee everything that comes to the insolvent between the sequestration and the time of filing the account and plan of distribution. Whenever any such property may be shown, or hidden, seen, or unseen, it belongs to the trustee as completely as the clothes he wears. All, then, that can be said is, that the insolvent may conceal, for six months or so, what, when it afterwards is produced, the trustee will find it difficult to identify as his property.

AUDITOR-GENERAL :—Does not the change proposed virtually confine creditors to the period which elapses before the plan of distribution ?

ATTORNEY-GENERAL :—I think not. Let me repeat that concealment by the insolvent does not prevent the property from vesting, in law, in the trustee. The objection then grows out of a supposed facility of concealing the property of the trustee in order that it may afterwards be brought forward as new property of the insolvent. I see no great temptation to concealment. But if there were such a temptation, is concealment facilitated ? I doubt it. I am decidedly of opinion that if the creditors are not able to find what property there is before the filing of the plan of distribution they will never find it ; and a man has the same object in concealing property, to have it when he gets his certificate, or even while he is uncertificated. It is before the filing of the plan of distribution that creditors are vigilant ; that they examine the insolvent ; his papers ; his clerks ; his wife's and struggle to extract the true nature of his estate. It may be that in spite of all this property is concealed. Suppose it to be so. But is it not, the moment it emerges, subject to be attached by the creditors, as newly-acquired property ? Believe me that no injurious consequences, in reference to concealment, can arise, sufficient to outweigh the advantages to be derived from the alteration now suggested.

Mr. Ross :—The fact is, that a man has no interest in concealment unless he wishes to incur new debts. For if he brings forward new property it can always be taken.

AUDITOR-GENERAL :—I confess I would prefer to fix, as the period, getting the certificate.

The ATTORNEY-GENERAL.—I should be glad to know the amount of all the property which has ever, since the passing of Ordinance

No. 64, been recovered for creditors in this colony after the filing of the account and plan of distribution in the several estates. I should think none at all.

VESTING OF INSOLVENT'S PROPERTY.

On the 49th section being read,

The ATTORNEY-GENERAL stated that, by Ordinance No. 64, the only provision in reference to the vesting of property had regard to the Master of the Supreme Court and the trustees elected by the creditors. When provisional trustees were appointed to administer the property, the right of property still seemed to be left in the Master. It was often of importance to know where the right of property resided, and there was no reason for not vesting in the trustees appointed by the court what it was considered proper to vest in trustees elected by the creditors. The property and the administration should be conjoined. The present section did this. In deference to an acute remark of Mr. Justice Menzies, an addition would be made to the present draft to cover some intervals of administration which had not been previously provided for.

TRADING BY UNCERTIFICATED INSOLVENTS.

On section 51 being read,

The ATTORNEY-GENERAL said :—The object of this section and its perhaps too great detail, is to provide for a matter which requires to be minutely provided for. In the interval between the order for sequestration and the filing of the plan of distribution, it is our object to prevent all trading and dealing on the part of the insolvent. By strictly prohibiting such trading and dealing, you deprive parties of a temptation to secrete their money. By so doing you make them the more anxious to please their creditors and get their certificate. And by so doing you protect the public from being plundered by parties who can never pay the debts which they incur. Were the period of inaction so long an one as formerly it might savour of hardship to enforce it rigidly. But limited to the extent to which, I trust, the Council will agree to limit it, no insolvent can complain of regulations which are necessary to prevent

fraud. Upon the other hand, every man, even an insolvent, must live, and there are some small things which, event in the disastrous interval so frequently referred to, he must be permitted to realize for his support, and with which his creditors have no concern. What he actually works for should be his. If some angry creditor break his head the damages recovered should be his own. But to prevent his trading under false colours you require that, if he conduct any trade or business as the agent of a third party, he must be authorised in writing so to do, and must also have permission, in writing, from the trustees of his estate. Nothing else will effectually prevent jobbing and collusion upon the part of such characters as Maggadas, of insolvent notoriety. Upon the same principle all credit given to such insolvents, of whom we afterwards provide that an alphabetical list shall periodically be published in the *Government Gazette*, is made, and made purposely, a desperate concern. Still some transactions are to be protected. I may sell my goods for ready money to any man who has the money to give me, and the insolvent is consequently enabled to pass title to cash paid down. By this means friends may assist the insolvent in his necessity, and he may safely buy what he requires with the money which they bestow. But once remove the barriers against the insolvent's trading, which are here established, and you will let in, though in a mitigated form, the evils presented by *Drayter vs. Dale*, *Young vs. Rushworth*, and all the class of cases to which they belong. We must exert ourselves to keep the insolvent out of the market until he has acquired the right to become possessed of property.

MR. EBDEN :—Would it not be too stringent to incapacitate him utterly ?

ATTORNEY-GENERAL :—I think not. Observe I am speaking of an uncertificated trader. Between the order for sequestration and the plan of distribution there should be no such character. Even now if an uncertificated insolvent sells a bale of goods on credit, can he recover the price ? *Young vs. Rushworth* says not, and I suppose that case would be followed in this colony. Here is roguery one way. When such a person goes to Mechau or Morkel for meat, a thing both natural and proper when the purchaser can pay,

can the butcher recover his money? Certainly not, and here is roguery another way. The court, indeed, will give you a judgment against the insolvent; but they will not give you execution against his goods, for the law says he can have no goods, nor against his person, for civil imprisonment is only meant to force a settlement from one whom the law regards as having means. The new creditors, therefore, must wait till the insolvent pays all his old debts, or till he gets certificated, or till doomsday, whichever shall first happen. Allow me to mention to the Council a recent case. Johnstone, the butcher, was, some years ago, insolvent, and Mr. James Mortimer Maynard was chosen his trustee. The estate was liquidated and distributed; but Johnstone did not get his certificate. He went into business again, and was, for a considerable time, supposed to be doing well. But afterwards he became a second time embarrassed, though without, as far as I am aware, any culpability upon his own part. Some of his creditors proceeded against him in the Magistrate's Court, and no defence being offered, obtained judgment; and the messenger of the court seized, in execution, things which had for years been considered to be Johnstone's goods and chattels. Before the sale Mr. Maynard, being aware of his responsibility to the old creditors, did what every prudent man will always do: he took legal advice and acted on it. The result was that the Supreme Court set aside the execution, gave the goods over to the trustee, and left the disappointed creditors to console themselves as best they could. Let us endeavour to put an effectual stop to such occurrences.

Mr. Ross:—By the new law such a thing, if it took place at all, could only do so prior to the plan of distribution. Afterwards the insolvent may go on.

[*Legislative Council, September 13, 1843.*]

EVIDENCE OF INSOLVENT.

On section 53 being read,

The ATTORNEY-GENERAL said :—In proposing to the Council to adopt the improvement of this section suggested by Mr. Justice Menzies, I shall avail myself of the opportunity to say a word or two with reference to the principle involved in the section itself. The object of the clause is to make the insolvent, in all cases, a competent witness. As the law now stands he is frequently incompetent. In every instance in which he is produced for the purpose of increasing the insolvent estate he is, while uncertificated, inadmissible to give evidence. And besides having his certificate it would, I apprehend, be necessary, in order to make him competent, that he should acquit or release any surplus which might, in contemplation of law, be considered as possible, upon winding up of the estate. Until these conditions have been complied with the insolvent has, in legal estimation, an interest in the event of the suit, and the law in general will not allow any witness who has an interest in the event of the suit to give his testimony. It would be out of place were I here to do more than advert to the fact that may eminent jurists object to the principle which excludes witnesses upon the ground of interest. They think, and I think with them, that the rule in question rests upon no consistent or reasonable basis. They say that the law allows people under a stronger bias to be sworn. The father may give evidence for the son. The bitterest foe may give evidence against his enemy. The most thoroughgoing partizan may give evidence in favour of his friend. Under these circumstances the jurists to whom I allude do not see the expediency of turning a Rothschild or a Baring out of the witness box because he has, or may be argued to have, some trumpery interest in the judgment being one way rather than the other. They therefore think that all such objections should go to the credibility and not to the competency. The only purpose of evidence

is the ascertainment of truth, and truth is always consulted by admitting evidence freely, since, as will be obvious upon a moment's reflection there are *criteria* of credibility altogether independent of the confidence to be reposed in the witness's veracity; and the nature of the story which is told may, in certain cases, of itself insure conviction. Such views as these I believe to be well founded. They are, at all events, spreading. A recent measure proposed by the Chief Justice of England, Lord Denman, is a decided indication of the course which law and legislation are disposed to take. But we are not now about to meddle with the general principle. In by far the greater number of cases which now come before the courts in this colony, and in which the evidence of the insolvent is likely to be called for, he has been decided to be a competent witness. Those cases are connected with the avoidance of undue preferences. It is a branch of the rule, in regard to exclusion on the ground of interest, that when the witness has an equal interest both ways he stands indifferent, and is therefore competent. When, therefore, the trustee of an insolvent seeks to recover from a creditor a payment alleged to have been undue, the insolvent is admissible upon the ground that as the effect of a judgment for the plaintiff would be to make the defendant, whose debt would be revived, a creditor for the amount recovered from him, the insolvent estate is not liable to be deranged by the result of the action, and so the insolvent is disinterested. If his testimony bring new assets into the estate it does so by drawing upon the same estate a new debt to the very same amount, and thus preserving the old balance. I am not sure that the costs of the action coming out of the estate, in case the trustee failed, would not, in legal contemplation, have the effect of damaging this reasoning, and proving that the insolvent had still an interest. But at all events there are a number of cases to which the reasoning referred to would not apply, cases in which the effect of the action if successful, would be to increase the estate. And since it is proposed by the present bill to forfeit, in certain cases, the original debt of creditors who receive payment with knowledge or notice of the debtor's fraud, the evidence of the insolvent in every such case would, in the absence of an express provision, be clearly objection-

able ; for then the result of the action, if successful, would be to recover assets without at the same time, increasing debts. Under these circumstances, although disposed to think that insolvent evidence is generally of a very suspicious character, I am of opinion that it should be universally admitted ; leaving the court at liberty to believe it or disbelieve it according to its inherent credibility or the degree in which it shall chance to be corroborated by other testimony.

RIGHT OF APPEAL.

On section 58 being read,

The ATTORNEY-GENERAL explained that the right of appeal to the court conferred upon preferent creditors by the last clause of this section was to prevent a meeting of concurrent creditors from directing the trustee to do something with the property hostile to the rights of the former class. A case had occurred in which premises mortgaged for a large sum had been contracted to be sold by the mortgagor to a third party. Before the completion of the transfer the estate of mortgagor was surrendered. The creditors at a meeting directed the trustee to enforce the contract of sale. The purchaser, however, had previously bought up judgments against the insolvent, and these he tendered in satisfaction of the purchase money. As the effect of giving transfer of the premises and receiving judgments in return would be to leave the mortgagee perfectly denuded of all claim and deprived of all satisfaction, the Supreme Court was moved to set aside the direction of the creditors, and to allow the premises to be sold in the usual manner. But the court held that it had no power to interfere, and the result was that the parties tried, at considerable expense, a regular action, which left everything precisely as it was before, and rendered necessary quite another course of proceeding. With the section as it now stood no difficulty could have been experienced.

MEETINGS OF CREDITORS.

On section 59 being read,

The ATTORNEY-GENERAL said :—That, at the recommendation of the Master of the Supreme Court, who, more than any other person

was competent to form an opinion, he had introduced this clause. The Master felt convinced that meetings of creditors would be more fairly and advantageously conducted when held before the Resident Magistrate or himself. In this view he (the Attorney-General) perfectly concurred.

CULPABLE INSOLVENCY.

On section 73 being read,

The ATTORNEY-GENERAL said :—This section, as my hon. friend beside me just remarks, is one of some stringency ; and the question is, does the Council recognize its necessity to such an extent as to warrant them in acceding to it ? It may be observed that almost every one of the delinquencies introduced into this section has long been provided for and punished by the insolvent law of England. By the insolvent practice of that country the court is empowered to remand to prison for any time not exceeding three years all parties proved to be guilty of such charges as are specified in this clause. This certainly is a great power, and I do not propose to visit the offences in question with so much severity. But looking to the nature of the acts prohibited, to the policy of determining by example, and the frequency with which such improprieties take place without the smallest inconvenience to any parties except those who suffer from the misconduct, I do not conceive that a power to imprison culpable insolvents for any period not exceeding nine months can properly be called excessive.

Mr. Ross :—It should not be more than six months.

ATTORNEY-GENERAL :—Well, if you think so, I have no objection to six months.

TRIAL OF CULPABLE INSOLVENTS.

On sections 74 to 79 being read,

The ATTORNEY-GENERAL said :—Although we have not yet agreed upon the section defining culpable insolvency, we may nevertheless assume that there will be such an offence to try. It therefore becomes necessary to fix upon the tribunals which shall take cognizance of that offence. Upon this subject it will be remembered

that the report of the committee recommended that the summary jurisdiction proposed to be created should be committed, immediately, to the Judges of the Supreme Court. Desiring to place so delicate a function in the most competent hands, so as to secure at once the utmost certainty of punishment for the guilty, and of protection for the innocent, the committee naturally regarded the highest judicial characters in the colony as the fittest depositories of the power which it was intended to bestow ; and not being aware, at the time, of the existence of any impediment, they framed their report accordingly. In fact I had, in part, prepared a section vesting the jurisdiction in the Supreme and Circuit Courts respectively. But, in consequence of a floating recollection of a particular provision of the Charter of Justice, I felt it necessary to refer to that instrument, and found, as I had feared, that its terms would not allow me to confer a summary criminal jurisdiction upon those courts. They can respectively try crimes by the assistance of a jury, and not otherwise. By the 34th section of the Charter it is directed that all criminal trials before the Supreme Court shall be had before one of the Judges of the said court and a jury of nine men. By the 39th section of the same instrument a similar provision is made in regard to trials in the Circuit Court. Now trial by jury is quite unsuited to such a class of cases as those which we have now in hand. Dependent, as they will often be, upon documentary evidence, upon matters of account, upon circumstances which may require adjournment of the inquiry, the trial by jury could never work with any degree of convenience. Under these circumstances it became necessary to find some other tribunals than the Supreme and Circuit Court, and it appeared to me that for the country districts the Courts of the Resident Magistrates should be chosen, and that for the Cape Division the Master of the Supreme Court should be created an independent court. By the 48th section of the Charter of Justice new courts, having a criminal jurisdiction over crimes not punishable with death or with transportation, may be established by the Governor and the Legislative Council, and my plan was to create, in the person of the

Master, such a new court. It appears to Mr. Menzies to be more expedient to empower the Master to hold, for the purpose only of these offences, the Court of the Resident Magistrate of Cape Town, and I agree that such would be the preferable course.

Mr. Ross :—What is the extent of the Resident Magistrate's power in the way of punishment ?

ATTORNEY-GENERAL :—As matters stand, imprisonment for a month in ordinary cases. But this Council may increase the power. I am not aware of any legal impediment which would prevent this Council, if so disposed, from bestowing by Ordinance the power of inflicting an imprisonment of ten years. In some peculiar cases, selling wines and spirits without license for example, the Magistrates may even now imprison for four months.

Mr. Ross :—I totally disagree with the plan of appointing the Magistrates in the country and the Master in the town.

ATTORNEY-GENERAL :—That is, in fact, the whole question : Is the Resident Magistrate or is the Master of the Supreme Court to try the cases of culpable insolvency arising in the Cape Division ? It appeared to me that the Master was to be preferred, and that for two reasons. The first of these is, that the Master has more opportunity of searching out the merits than the Magistrate can well possess ; and although considerations of distance preclude the possibility of bringing all cases under his jurisdiction, there seems to be no difficulty in committing to him the cases of the Cape Division. The other reason is, that the Resident Magistrate is already burthened with numerous and arduous duties. His ordinary criminal and civil business is very heavy, to say nothing of shipping cases and his labour as Civil Commissioner. The addition which would be made to the duty of the Magistrate by imposing upon him the task of taking these insolvent cases might prove considerable ; while in the case of the Master, those cases are so much connected with his present functions as to require from him comparatively much less labour. I should therefore be in favour of giving the jurisdiction to the Master ; but if the Council—

The GOVERNOR :—The Judges are not of the same opinion.

ATTORNEY-GENERAL :—Mr. Justice Menzies is, clearly.

The GOVERNOR :—I understand the Chief Justice has not been communicated with, and that he sees objections to the Master.

Mr. Ross :—And so do I. I object to any officer of the court.

The ATTORNEY-GENERAL :—With respect to any difficulties which any of the Judges present feel, it is right to state that the other Judges are of course unconnected with the remarks of Mr. Menzies, which were, I believe, in print before his brethren could have seen them. He does not profess to give the opinions of anybody but himself ; and, speaking only his own sentiments, does not affect to bind any other party. After what has been said, however, it will be well to allow this question to stand over for further consideration, and I shall not, at present, make any further remarks upon the subject. But before sitting down I should wish to observe upon some matters connected with the mode of prosecuting for culpable insolvency prescribed in the two sections of the draft immediately succeeding that which we have been just considering, a mode which I have at once abandoned, but a mode which by the bare mention of it seems to have afflicted Mr. Menzies very deeply. It was proposed, the Council will remember, to allow those peculiar offences to be prosecuted by the trustee of the insolvent estate, or any injured creditor or any other injured party. This has occasioned the learned Judge great and, as far as I am concerned, most unintentional discomfort. He says, at page 7 of his recent observations,—

“The provisions as to the mode of prosecuting for the offences set forth in the 73rd clause are utterly inconsistent with the principles which were, by the British Government, deliberately and advisedly introduced into the law and constitution of this Colony for regulating the prosecution of offenders, and would introduce into the judicial system, in so far as relates to the prosecution of crimes, a most glaring anomaly, and one the advantages to be derived from which it is difficult (to me it has been impossible) to discover.”

And in the succeeding page Mr. Menzies again observes :—

“I feel it my duty to submit to His Excellency the Governor, in

the strongest and most earnest manner, my decided opinion that the alteration proposed to be made by this Ordinance on the existing law of the Colony as to the right of prosecution, not only possesses no recommendation from the expectation of any advantages which it will effect, but will be attended with many dangerous and injurious consequences, even if there exists no intention on the part of its supporters hereafter to extend the anomaly which they are bent on introducing into the law of the Colony to other classes of offences, but much more if its introduction is intended to be the insertion of the point of that wedge which is ultimately to overturn the right of prosecution exercised as at present by responsible public officers, and introduce in its stead, in compliance with the wishes or suggestions of persons prejudiced against, or incapable of rightly appreciating the advantages of the present system, the right of private and irresponsible prosecution, which exists in the law of England merely because it does so exist in that law, and without regard to the evil consequences which it there produces, and which are daily becoming to be more apparent, and more grievously complained of in England."

Now I must most clearly and distinctly state that the learned Judge, in this instance, not content with seeing far enough, insists upon seeing much too far ; and discovers a deep significance in things which had no such meaning as he seems to suppose. In allowing the trustee to prosecute in a class of cases which are in their nature midway between civil and criminal, my only object was to leave the matter in the hands of those most likely to attend to it, and, perhaps, to relieve the public from some expense. If the law remains as Mr. Menzies thinks it should remain, and as I, for one, am quite willing to let it stand, the result will be that cases will come, in common form, under the cognizance of the Attorney-General, who will determine whether he should prosecute at the public instance, or give the usual certificate. For the law is not that private prosecutions can be stopped by the public prosecutor. All that this officer can do is to refuse to prosecute himself, and give a certificate, under his hand, that he so refuses. Under these circumstances, the object of the draft was considered

quite innocent and harmless ; and but that the imagination of the Judge was haunted by the ghost of some departed hostility to the office of public prosecutor, he surely could not have conceived the idea that I had conspired with some person or persons unknown to subvert the right of prosecution by public officers, a proceeding which would go far to make my office a thing of history, and, of course, to make myself a thing of history as well. The Judge may feel most comfortably convinced that I have no such suicidal notions. That the office may long exist, and also the officer, I fervently desire. But the Judge actually waxes metaphorical in its defence. This is new. His argumentation is admittedly unrivalled ; he is, certainly, one of the acutest men I have ever known ; but he seldom resorts to tropes and figures, and whenever I attempt to do a little business in that line, he always declares that he does not understand me—the more's the pity, whether it be my fault, or his misfortune. Here, however, he rises into illustration, and actually goes so far as to call this little clause “the point of that wedge” which is ultimately—to do what ? to split ? no, but to “overturn” (wedges don't commonly overturn, do they ?) “the right of prosecution exercised at present by responsible public officers.” But I rather think he is mistaken. An immediate right of prosecution by other parties besides the public prosecutor has been bestowed by former Ordinances. What the Judge characterizes as an “anomaly,” which is bad enough, and a “wedge,” which is far worse, is not here mentioned for the first time. It may be found in a much older piece of legislation, namely, the Municipal Ordinance for Green Point. In the 61st section of that law I find it thus written :—

“And be it further enacted, that all offences committed in contravention of this Ordinance, or of any municipal regulation made under the authority thereof, may lawfully be prosecuted by the said commissioners, in manner hereinbefore provided, in the Court of the Resident Magistrate for Cape Town.”

Now here is the passing over of the responsible public prosecutors, the anomaly, the wedge, and all the rest, residue, and remainder of the apprehended mischief ; for between a contra-

vention of an Insolvent Ordinance and the contravention of a Municipal Ordinance it will be hard to draw the line. But still the right of prosecution by trustees is a "glaring anomaly," and "a wedge," and the right of prosecution by commissioners is neither the one nor the other ; at least such must be the opinion of the Judge, for he was himself the framer of the Green Point Ordinance. The truth is, that to allow commissioners to prosecute for municipal offences is a convenient course. In the same manner it appeared to me to allow trustees to prosecute for the offences of insolvents would be a convenient course as well. It thus came to pass that a plan was proposed which was conceived in the utmost singleness of purpose, which was guiltless of the smallest possible design to overturn, by wedge or otherwise, the existing system of the Colony, and which I only regret having put forward because it has been supposed by the learned and able Judge to indicate a disposition upon the part of some persons, and perhaps upon the part even of the public prosecutor himself, to give the public prosecutor the go-by.

Adjourned.

UNDUE PREFERENCES.

On section 89 being read,

The ATTORNEY-GENERAL said :—We have now reached a most important portion of a most important measure. We have reached the portion of the bill which proposes to set aside, in favour of creditors, certain transactions into which the insolvent may have entered, being of a detrimental character. Those transactions are divisible into two classes. The first class regards transactions in the course of which the insolvent alienates his property without valuable consideration. The second class regards transactions in which the insolvent receives valuable consideration, but in which he gives some creditor a preference over the rest, thus deranging what is considered to be the just equality of creditorial rights. The principle upon which the cases which compose the first class rest will be readily understood and as readily assented to. It is directed against the attempts of persons in desperate circumstances to deprive their lawful creditors of that which should go in satis-

faction of their claims by alienations of a gratuitous description. Proceeding upon the proverb that every man should be just before being generous, it declares that persons who can only make donations at the expense of disappointed creditors shall not make donations ; and requires, as the lesser of two evils, that the party who has received assets without having given value for them should restore those assets to claimants who must, otherwise, remain unpaid. This is the object of section 5 of Ordinance No. 64, and is an object contemplated, I believe, by every system of jurisprudence, ancient or modern, which has been framed to regulate the respective rights of creditors and debtors. The expediency of every such provision rests upon two reasons, the one, that men whose circumstances are desperate, who are plunged in irretrievable insolvency, and who contemplate the non-payment of their just debts, should not be at liberty to provide a refuge for themselves by pretended gifts (which are, *de facto*, trusts), of the property that should belong to their creditors, in order that when the evil day arrives the insolvent will have had something thus laid up wherewith to meet it ; and the other, that men who have acquired property from the insolvent, by no course of dealing, in pursuance of no contract, but voluntarily and without value, can complain of no injustice when they are prevented from growing rich by that which is a loss to other people, and are called upon, in favour of creditors, to make good what was gratuitously bestowed. With this brief but I hope satisfactory explanation of the grounds upon which alienations made without valuable or onerous consideration are proposed to be made void, I quit that portion of the subject and proceed to the discussion of the other class of void transactions to which I have adverted—I speak now of undue preferences amongst creditors. Here there is no absence of valuable consideration, for the debtor who pays his debt receives valuable consideration in the debt discharged. These cases rest upon another principle, and one of which the application is not easy. They are governed, at present, by the 7th and 11th sections of Ordinance No. 64. When it was found that those sections had begun to excite a good deal of attention ; when, as interpreted by some

decisions of the Supreme Court, they had notoriously created a great deal of alarm, it became necessary to examine them closely, to ascertain their character, and either to pronounce the clamour against them an ignorant clamour, or else to provide such alterations as should render the law more consistent with the true principles of jurisprudence and the reasonable security of trade. That much anxiety has existed upon the subject admits of no dispute. One respectable merchant, whom I see in this room, is deprived of his natural rest by the existing law; and the same law, it appears, threatens to send my hon. friend opposite (Mr. Ross) to plant potatoes. Let us then, in order, if we can, to shed repose around the pillow of Mr. Sutherland, and detain my hon. friend from the ignoble task of propagating potatoes, investigate with as much accuracy and candour as we can command the nature and operation of the law now regulating void transactions, for the purpose of making such wholesome alterations as may seem to be required. That law must be looked for either in what I may call the common law of the Colony, the Roman-Dutch law, or else in our colonial statute law, the local legislation of the Cape. With regard to alienations made without valuable consideration, the Roman-Dutch Law sets its face against them with the same sternness that characterizes Ordinance No. 64. Such alienations were, by the Roman-Dutch law, void or voidable as against disappointed creditors——

MR. EBDEN :—Is there not a limit?

ATTORNEY-GENERAL :—I am not aware of any limit other than that gratuitous alienations might, of course, be made by a man not insolvent. It does not appear to me that section 5 of Ordinance 64 materially, if at all, extends the common law of the Colony. But with respect to preferences amongst creditors the case is very different. So far as I am acquainted with the subject, I should say that so long as the debtor retained the administration of his estate, and down to the period at which the estate was taken out of him by the "*missio in possessionem*," or actual sequestration, as we may call it, he might pay any just creditor a debt completely due; that every such payment was a good and valid one for all intents and

purposes, and that whether it were made through force of legal process, or by the pressure of importunity, or voluntarily and spontaneously, without either importunity or process, made no difference whatsoever. When the creditors had got possession, indeed, another order of things prevailed. After the messenger had taken possession, when the "*missio*" had been extended, all acts of the deprived debtor were null and void. But down to that period he retained, I apprehend, not merely the legal *dominium* of his estate but the unfettered power of paying such creditors as he pleased all just debts already due, having within these limits a power to prefer. To the framers of Ordinance 64 it appeared that the provisions of the common law were too lax. They seemed to allow transactions to stand which deserved to be set aside. To reach a number of cases which were not reached by the common law sections 7 and 11 were introduced. The 7th section relates to alienations of goods and effects. The 11th section relates to cases which, in a philosophical point of view, are the same, but in which the thing given is money ; that is, to payments. Different principles are provided for the regulation of these different modes of satisfying debts. The 7th section declares void all alienations not compelled by legal process made when the man knows himself to be insolvent, or contemplates the surrender of his estate as insolvent, or knows that proceedings have been commenced for a compulsory sequestration, or when the alienations have been made within sixty days of the making of the order of sequestration, provided, in every case, they have the effect of preferring one creditor to another. I am not sure that there is, in practice, any use in coupling a contemplation of surrender, or a knowledge of hostile proceedings to obtain a sequestration having been commenced, with the comprehensive condition which precedes them, namely, knowing himself to be insolvent. Knowing himself to be insolvent is a circle large enough to contain invariably the other two. A man may know himself to be insolvent without contemplating the surrender of his estate, but that he should contemplate the surrender of his estate without knowing himself to be insolvent is scarcely supposable. The condition in regard to the sixty

days, however, is one of a very different description. This is a provision which overleaps all knowledge of insolvency, and is completely irrespective of the debtor's circumstances. If the insolvent be to-day worth surplus thousands, and with that knowledge makes an alienation to a creditor, a sale of merchandize, for example, to be set off against the debt, yet if within two months he be driven by some act of God, fire, or shipwreck, to surrender an estate which has thus unexpectedly been made insolvent, alienation is avoided. To have been made, under any circumstances, however unequivocal, within sixty of the insolvency, is of itself absolutely fatal. Now, whatever observations I may have to offer with regard to the principles upon which section 7 is based, I am able to bestow upon it the commendation of being clear, unambiguous, and, in practice, of easy interpretation. We come next to payments of money as contradistinguished from alienations of effects. We come to the well-known section 11, a section against which a much greater degree of hostility exists than any by which section 7 is assailed. And here I must take leave to say that although Ordinance No. 64 was framed by two very able men, Mr. Justice Burton, of New South Wales, and Mr. Justice Menzies, of this Colony, and although signal marks of their ability are to be found in many portions of the law in question, I find no such marks in this complicated and by no means creditable section. Of Mr. Burton, judging by his book and his legal reputation, I am disposed to think highly. The other Judge is one of the acutest of men, with a fine, analytical understanding, and a positive inspiration for drawing Ordinances. It was said of Pope that "he lisped in numbers." I should scarcely imagine that this was the case with the learned Judge; but that his first utterances were of a nature to prove an instinct for law-making I could readily believe. In criticising his work, as I have a right to do, I freely acknowledge my own comparative inferiority. There may be one or two things that I have the vanity to think I can do as well as the learned Judge,—jumping, for example,—(Mr. Menzies, if he were here, would, perhaps, suggest that "bouncing" would be a better term) or generally, anything dependent on length of legs; but as regards the power of drawing Ordinances, I confess

my immeasurable inequality. But now, having said this much, and said it too with all sincerity, I will say further, that in the whole course of my reading, in the whole course of my life, in Acts of the English Parliament framed by country gentlemen, in Ordinances of the Colonial Legislature, sometimes not very artificially constructed, I have never read, at home or abroad, a section upon which so much depends wherein there is so little evidence that the draftsman clearly understood what he was writing. It is bad throughout. As Dr. Johnson said of a leg of mutton on which he dined once at Oxford, and which grievously disappointed him, expressing himself with that energy which ever characterized his language when his feelings were profoundly touched, "Sir, 'tis altogether bad, 'tis ill-fed, ill-killed, ill-kept, and ill-dressed." So I say of this 11th section, Sir, it is altogether bad, 'tis ill-designed, ill-placed, ill-arranged, and ill-worded. Go where you will, you find men, not deficient in intelligence, disputing about the sense which the clause is intended to bear, and there is so much argument about its meaning that its policy is not reached or subjected to due discussion. Payments by the insolvent and payments to the insolvent, both classes being clogged with numerous conditions, and all crammed into one section instead of being kept distinct, are found respectively going up and down like buckets in a well, only without their regularity of movement. And whereas improper alienations in the 7th section are declared *null and void*, improper payments in the 11th section are only declared to be *fraudulent*, a difference of language which would argue a difference of meaning, while it would yet appear that no difference in meaning is sought to be conveyed. Alienations, again, made by a man knowing himself to be insolvent must, under the 7th section, have the effect of preferring one creditor to another. But it is not said that payments, under the 11th section, must have that effect in order to be void ; so that if a man, knowing himself to be insolvent, turned all his assets into money and paid his creditors *pro rata*, preferring none of them, all his payments would, nevertheless, be fraudulent. The words "really and *bona fide*" are, in this 11th section, applied to payments by the insolvent ; in almost the very next line, the

very same words are applied to payments to the insolvent ; and yet the sense of the section as given by the Court requires a different meaning to be attached to the words in the one case from that which is held to belong to them in the other. And to crown the whole, there is an air of mystification about the whole clause which demands the utmost watchfulness at the hands of the reader who would avoid mistakes. In a very clear and able article in the last *Commercial Advertiser*, the editor has been misled so as to give to payments by an insolvent a condition which belongs only to payments to an insolvent, and has thus exposed his argument to danger. Do I, therefore, speak too strongly when I say this 11th section is hard to be understood ? But, aided by construction, we can give its meaning. By the 11th section, then, it is held to be provided that all payments made to any creditor by any person knowing himself to be insolvent, or contemplating the surrender of his estate as insolvent, or knowing that proceedings have been adversely commenced to make him an insolvent, or knowing that an order of sequestration has been, made, and having the effect to prefer one creditor to another, are *null and void*. This is not the language of the section, but it is the effect of the decisions upon it ; for, in Court, we have always taken so much of what I have now said, as it is not expressed in the clause to be tacitly understood. Without pausing to point out that section 11 as well as section 7 seems to accumulate a greater number of tests of invalidity than are absolutely necessary (for the knowledge of insolvency in itself covers the entire ground), it is of essential importance, since payments made by any man who knows himself to be insolvent are invalid, to ascertain clearly what it is to be insolvent, and what it is to know one's self to be so ; for upon these two points hang the security or insecurity of payment. If you wish to know the views of the highest authority upon the subject, the bench of Judges, turn to the last remarks of Mr. Justice Menzies, where at page 12 you will find it thus written :—

“ The numerous and carefully reported and uniform and consistent decisions of the Supreme Court have so clearly fixed and determined the legal construction of the term insolvency, that no

counsel or attorney, whose opinion is worth taking upon any legal question, can find any difficulty in giving a correct and certain opinion as to whether the transaction, as to the validity of which his opinion is asked, is or is not reducible."

But the learned Judge still considers, and in my mind very properly, that doubts may here and there exist; and for the purpose of effectually and for ever dispelling these he proceeds to give, in the form of a proposed declaratory section, the sum and substance of the numerous, uniform, and consistent decisions of the Supreme Court.

"And be it enacted that every person who shall have committed any act hereinafter declared to be an act of insolvency, or the assets of whose estate immediately available to him for the payment or satisfaction of his debts or obligations shall be insufficient to pay or satisfy the debts or obligations which he shall be required immediately to pay or satisfy, or whose liabilities, calculated fairly, shall exceed his assets fairly valued, shall in law be deemed and taken to be an insolvent person."

This, then, is the sum and substance, the extracted essence of the numerous, uniform, and consistent decisions of the Supreme Court upon the definition of insolvency. I have no doubt that it is correct. But after four years' practice in that Court, during which I have argued some of the decided cases, I should have hesitated before saying that I had ever heard from the full Court any distinct definition of insolvency, or that any such definition, if given, was similar to that which Mr. Menzies so very clearly lays down. I bow, however, to the authority of the learned Judge, and take it now, amongst other things, that a man is in law insolvent in each of two cases, the one in which, with any amount of property you please, he has not ready money enough to pay his debts as they are demanded, and the other in which, with plenty of ready money to pay his debts as they are demanded, his property if valued would not be enough to cover all his liabilities. A merchant may have assets to treble the value of his debts,—no matter, if he has not cash when his creditor calls, he is an insolvent person. An insolvent may have cash in plenty and pay his creditor as he

calls,—no matter, if his assets fairly valued would not cover his liabilities fairly calculated, he is an insolvent person. By the 11th section every payment made by any merchant knowing himself to be in either of these predicaments is null and void, and the creditor paid, after any lapse of time, may be compelled to refund. The merchant short of cash, and who, although possessing property, knows that he is short of cash, cannot support his credit by any payments; for all such payments are void and nothing can save them. The merchant who has cash but is short of property is not quite so badly off, for Mr. Menzies adds a proviso to his declaratory clause to the effect that he will not be deemed to know himself to be insolvent if it be proved to the Court that he had reasonable grounds for believing that he would have assets equal to his debts by the time his debts became due. Behold, Sir, the result of the numerous, uniform, and consistent decisions of the Supreme Court. I know something of mercantile life, and of the inevitable vicissitudes of trade and speculation; and I fearlessly assert that there is, in all probability, scarcely one house of great eminence in London which at some period or other of its career has not found its immediate funds short of its immediate liabilities, or, upon the other hand, its assets, for the time, insufficient for its debts. But, hoping and working, it held on and overcame its difficulties; and to say that all payments made by such a house merely for the maintenance of its credit were to be treated as absolutely null and void would be to prostrate all commercial confidence and credit in the dust. Observe, Sir, that all consideration of the debtor's motive is studiously excluded. In section 11 it is not even said that the payment to be void must have the effect to prefer. But I conceive that omission to have been inadvertent, and have construed the clause as if it were inserted. It is clear however, that any intention or purpose in the mind of the debtor to give to the paid creditor an advantage is not regarded. He may have never seen that creditor's face; when making the payment he may not know who the creditor is; a mercantile rival may be paid in the usual course of trade and dealing, for the purpose merely of sustaining credit; all this avails nothing; the law is inflexible, and the payment must be set aside. No doubt the

11th section declares that a payment made under compulsion of legal process is protected. But what is such compulsion? It has been decided by the Supreme Court that when a man sues his debtor, files his declaration, sets down the cause for trial, and is prepared to prove his case, if the defendant come to the attorney, and pay debt and costs, the plaintiff may be compelled to refund both, because there was, in law, no compulsion by legal process to take the payment out of the operation of the law. Under these circumstances, and having thus explained the nature, principles, and working of the system, I ask the Council to determine whether or not that system is consistent with the reasonable security of trade; or whether, on the other hand, aiming at an impracticable equality amongst creditors, it is not calculated to do much more harm than good, and should not, therefore, be replaced by principles which would apply only to cases in which some moral impropriety was involved. In order to be clearly understood, and to relieve myself from the suspicion of overstating the provisions of the existing law in reference to undue preferences, I shall lay before the Council the facts of two cases which have been recently decided in the Supreme Court, both, as it happens, growing out of one estate. The first of these cases was the *Trustees of Jaffray vs. Chiappini*. Jaffray carried on business in Graham's Town, chiefly as a factor or agent for other people. Amongst those who employed his services in that capacity were Chiappini & Co., of Cape Town. Chiappini & Co. having found it convenient to establish an agent of their own in Graham's Town, ceased to consign to Jaffray, who remained, to some extent, in their debt. Chiappini's new agent was, of course, instructed by his principals to get a settlement from Jaffray as soon as he could. After demanding the money more than once, Jaffray gave a draft upon the Eastern Province Bank for £100 on account, which the other received. This was in the very early part of February. In the course of the succeeding April, Jaffray, having failed in effecting a composition with his creditors, surrendered his estate; and some months afterwards the trustees sued Chiappini & Co. for the £100 and recovered it. It appeared that in the middle of January Jaffray had been made aware that his affairs, as

balanced up to the preceding October, showed a deficiency of, I think, two and sixpence in the pound, and that he had not improved in February. It was vainly urged that Jaffray had no feeling for Chiappini and Co., that what he did was in sustainment of his own credit, that it would have been done to any creditor similarly situated, that it was fair and *bona fide*, and in the common course of trade. The Court declared that with these things they had, under the Ordinance, nothing to do; that the only question was whether Jaffray knew himself to be insolvent when he paid Chiappini & Co., and that, being satisfied upon that point, the judgment followed as a necessary effect. Chiappini & Co. were ordered to refund. As it was, the sum was only £100; but it might have been £10,000; it might have utterly ruined them. But such is our colonial law.;

Mr. Ross:—Let me put a single question to you. Do you think that a Court of law in England would have given the same decision?

ATTORNEY-GENERAL:—It would sufficiently serve the purpose of my hon. friend to state that before I conclude it will be necessary for me to explain fully what I consider the English principle to be, and I shall then give a distinct answer to the pithy question which he has just put, but in the meantime, I may as well proceed to state the circumstances of the second case which I promised to submit. This was the case of the *Trustees of Jaffray vs. Christian*. The circumstances were these:—James Searight & Co., of Cape Town, consigned to Jaffray in Graham's Town upon commission. In November, 1841, the latter, owing to the former £260 odd for goods sold on a *del credere*, sent them his promissory at four months for the amount. Searight & Co. discounted this note with Mr. Christian a day or two after they received it. Mr. Christian locked up the note, and Mr. Searight took the money. The note was made payable at the office of Home, Eagar & Co., of this town, and upon the day of its maturity Mr. Christian sent it for presentation, and it was paid with money which Jaffray had provided; whereupon Mr. Christian's messenger receipted the bill and gave it up; and Mr. Christian that night slept comfortably, as did, I have no reason to doubt, Mr. Searight too. But, alas! Sir, what is man? and what his payments? Mr.

Christian, a long while afterwards, when he had nearly forgotten that there ever had been such a bill, was disagreeably disturbed by the receipt of a well-known but by no means popular communication, witnessed by Sir John Wylde, Knight, and commonly called a summons, by which he was commanded forthwith to repay the £260 aforesaid, received by him from Jaffray when Jaffray knew himself to be insolvent. The cause came on for trial, and Mr. Christian was ordered to refund. It was admitted by the bench that Mr. Christian was in *optima fide*, that all idea of intention upon Jaffray's part to prefer him was out of the case, that Jaffray, when he sent provision for his note, had no notion of the hands in which it was, that his only object was to keep his business going, that the money had been received by Mr. Christian in the regular course of trade, as applicable to the presentation and payment of negotiable instruments. But all this availed the defendant nothing, so long as it was admitted that Jaffray, when he sent provision, knew himself to be insolvent. Now this decision has excited, and still excites, much mercantile alarm. I conceive that alarm to be a just alarm. The Banks perceive that they are threatened. Had the Cape of Good Hope, the South African, or the Eastern Province Bank been the defendant, the same rule must have been applied, and the same judgment given. The Bank would have been discounter, and Mr. Christian was the same. It was decided that no original privity between the insolvent and the party paid was necessary to constitute the character of a creditor within the meaning of the 11th section of the Insolvent Ordinance, but that every person who by cession or any other means was in such a situation that he could, in case of insolvency, have been admitted to prove a debt, was, for that reason, a creditor equally liable to refund with any creditor whatever. Upon this ground the last endorser of a bill, which may have a number of good names upon it, is equally liable with any common creditor to refund the amount of that bill, if the acceptor, when providing for its due honour, knows himself to be insolvent. Now, if the effect of receipting and giving up a bill duly honoured be to discharge prior endorsers who, of course, receive no notice of dishonour, the situation of the holder is

most hard. Mr. Christian had Searight & Co. bound by their endorsement. Had Jaffray never paid the bill, Mr. Christian would have received the money from Searight & Co. But because Jaffray did him the damage of paying the bill, Mr. Christian, if the law be as I am now supposing, loses the amount. It is right to observe that the Court, in giving judgment, expressed their opinion that Searight & Co. were not discharged, although the bill was due in February, 1842, and down to the time of delivering judgment on the 30th August, 1843, the endorser had had no notice. This was merely a dictum, for the point was not one which their lordships professed to decide. That opinion may be well founded. But I respectfully dissent from it. I should wish to see some authority produced in its support. It is a startling thing to say that an endorser who, by the law merchant, makes it a condition of his guarantee that he shall have notice of dishonour within a reasonable time, shall, after the lapse of months or years, be held liable upon a bill which never was dishonoured at all. It is a startling thing to say that an endorser who is liable only upon non-payment shall be liable upon a bill which was actually paid, although rightly or wrongly that payment is declared to be fraudulent. It is a startling thing to say that every fraudulent payment, when set aside, replaces matters just in *statu quo*. My present impression is against this view. I conceive that the principle of a passage which I shall read to the Council out of *Bell* does not countenance that view. Speaking of the effect of the reduction or setting aside of the preference, *Bell* observes in his 2nd vol., page 233, 4th edition,—

“If a third party is bound as a co-obligant with the bankrupt, and his obligation has been cancelled on the bankrupt granting the security challenged, the holder of that security cannot, on its being reduced, have his remedy against the third party, or oblige him to restore to efficacy his obligation which has been discharged.”

Observe, Sir, that I do not quote this as bearing upon the very case of an endorser. But I quote it as involving a principle which extends to that case; for the neglect to give notice of dishonour of a bill in mercantile course amounts, I conceive, to a cancellation of the endorser's obligation. The Chief Justice, indeed, distinctly

stated that, in his view of the case, Christian could not recover from Searight in an action on the bill. But, upon the principle that Searight had received Christian's money for the instrument, and that the consideration had ultimately failed, his lordship considered that an equitable action might be raised in the nature of the English action for money had and received. I confess I am not able to assent to this reasoning, and conceive that the action must be upon the bill or not at all. Mr. Menzies went upon this principle, and distinctly laid it down that if Mr. Christian, on the 30th August, 1843, left the Court and gave notice to Searight that the note of Jaffray was dishonoured on the 5th or 6th of February, 1842, Searight was responsible as much as if he had got notice the day after the note was due.

Mr. Ross :—Suppose Searight, in the meantime, had gone to England.

ATTORNEY-GENERAL :—We need not argue that question. In theory his removal would not affect the nature or extent of his legal obligation. But assuming, for a moment, that Mr. Searight had quitted Cape Town and settled in Liverpool, and that an action were tried there by a jury of Liverpool merchants, I cannot persuade myself that they would recognize such a doctrine as would revive, after years, the liability of an endorser because the payment by the acceptor was fraudulent in law. I do not care, however, to discuss this question further. It is immaterial, in my opinion, whether it is the holder who loses by losing his recourse on the endorser, or the endorser who loses by having that recourse unexpectedly preserved. The holder, let us admit, may fall back on his endorser. But his endorser may have prior obligants bound to him who were solvent when the bill was due, but who have become insolvent in the lapse of time, and what is he to do then? In my mind, the hardship is so equally balanced in both cases that it is scarcely worth while, in discussing the policy of the law, to draw a line between the sufferers. I have thus explained and illustrated, as clearly as I could, the principle and operation of the 11th clause of Ordinance 64. But before I quit it, there is a matter which I am bound not to leave unnoticed, because it has been ably written about,

and ably argued about, and because it is intimately connected with the true construction of this celebrated clause. By casting your eye over the section, you will perceive a declaration that all payments really and *bona fide* made shall be valid. Founding themselves upon this declaration, many persons have contended that the outcry against the Ordinance is most unfounded and unjust. They have contended that there is a protective power in that declaration which protects every transaction that deserves to be protected. They have contended that it is to contradict the plain language of the framers of the law, to represent them as having meant to impeach real and *bona fide* payments, which, on the contrary, they expressly declare valid. They have contended that every payment which is real as opposed to pretended, and *bona fide* as opposed to a fraudulent intention, is saved by the very terms of the clause itself. They have contended that this is the meaning of the phrase "real and *bona fide*" when applied, in the same section, to payments to an insolvent, and that there is no reason to give a different meaning to the phrase when applied to payments by an insolvent. All this has been contended in Court and out of Court by myself and others, but never more strongly than in a recent article in the *Commercial Advertiser*. But it has been contended in vain. The Supreme Court has solemnly overruled all such arguments. I hold in my hand the *Cape Town Mail* with the judgment of Mr. Justice Menzies in the case of *Trustees of Jaffray vs. Chiappini*, and I find it therein thus laid down :—

"Even if this payment could be considered as in every other respect *bona fide*, this would not protect it from the operation of the last-mentioned clause of the Ordinance, that clause being that all payments made to any creditor by any person knowing himself to be insolvent should be fraudulent."

The Chief Justice is quite as express upon the same point. In his judgment in the case of *Trustees of Jaffray vs. Christian*, he thus expresses himself amidst a good deal more to the same effect :—

"The Ordinance, however, makes the exception that 'all payments really and *bona fide* made by any insolvent shall be valid ;' but the immediately preceding part of the enactment in the same clause

of the Ordinance enacts that a *person knowing himself to be insolvent at the time cannot make a bona fide payment*, because any such payment made by such persons, with such a knowledge, must be held in law fraudulent, and therefore void."

It is therefore perfectly indisputable that the Court has pronounced that the protection given to payments really and *bona fide* made does not protect any payment which is made by a man who knows himself to be insolvent. No indifference of mind as to the creditor preferred, no common course of business, nothing whatever but a writ of execution, will save a payment made with a knowledge of insolvency. And here, again, I complain of the structure of this section. Where did those words "*really and bona fide*" come from? Let me trace their history. The English Bankrupt Acts began by avoiding all transactions between the act of bankruptcy and the commission. It became necessary to control this destructive principle. Accordingly the Act 19 Geo. 11, c. 32, section 1, provided that "no person really and *bona fide* a creditor * * * should be liable to refund any money which was really and *bona fide*, and in the usual and ordinary course of trade and dealing, received by such person of such bankrupt." This Act was narrowly construed by the Judges. They held that the course of trade and dealing meant legally the course of buying and selling, and nothing more. By this means the Courts cut away the ground from under the feet of the Legislature. The 6 Geo. iv., c. 16, section 82, therefore, omits the words which had been construed so as to limit too much the operation of the clause, and gives validity to real and *bona fide* payments without stint. But it never is doubted, never has been doubted, and never will be doubted, that payments made in the usual and ordinary course of business are contemplated and ratified by the English Act. Under these circumstances, we find terms which are borrowed from the English law, and which have in that law a clear and undisputed meaning, transplanted into Ordinance No. 64, and placed in such a position that they seem to be intended to retain their primitive signification, which, however, they do not retain, but, on the contrary, leave behind them altogether. But someone will say, "Since these words do not mean *here* what

they meant in England, what, pray, is their exact meaning?" Now, this is a question which I cannot answer. When I have asked it myself, I have been told a great deal about what it does not mean. But when we seek to pass from negatives to affirmatives, from what it does not mean to what it does, we are stopped for the want of some intelligible sense. I remember, indeed, that Mr. Justice Menzies threw out, in argument, something of a more affirmative description than I had been accustomed to. "*Non constat*," said he, "but there might be payments not declared to be fraudulent by the first part of this section, which yet are fraudulent by common law, and these, if really and *bona fide* made there was an intention to protect." But I cannot admit this to be a satisfactory solution. The common law is not more stringent than the Ordinance. On the contrary, as I have already pointed out, it is much less stringent. There is not (or if there be I have never heard of it) any payment which could be made by a debtor to his creditor which would be free from objection by the Insolvent Ordinance, and which would yet be fraudulent at common law; but on the other hand there are many payments which would be protected by common law which are fraudulent by the Insolvent Ordinance. Again, therefore, I ask, first, has this clause any meaning at all? Secondly, if it have no meaning, what business has it there? And, thirdly, if it have a meaning, what is it? But waiving further argument upon a point which I have only discussed at so much length because I know that it has excited amongst argumentative persons a good deal of attention, I would call upon this Council to say whether it is satisfied with the law as it has been this day disclosed? Sir, I venture to assume that it is not satisfied with it; and in determining what alterations it may be expedient to introduce it will be proper to take a cursory view of foreign legislation. We shall find, in the principles which obtain in the more important of the mercantile communities but little uniformity. By the law of France, according to *Pardessus*, whom I have consulted, alienations, as we should say, are reducible if within ten days of the cessation of payment; but payments of debts actually due, in the common course

of business, are good to the very last. Of the law of modern Holland I can only speak from the information of a friend who consulted for me the "Koopman's Handboek." And far as I can learn payments may be set aside if made within forty days of sequestration, alienations if within sixty days, and in case of the creditor being related to the insolvent a still longer period is allowed. It would appear that the only test of invalidity is time, but I speak with that degree of uncertainty which arises from the fact that I am not acquainted with the law in question from personal examination. Turning to Scotland, we find that the subject now in hand is regulated by two statutes, one, the second branch of the Act of 1621, and the other the Act of 1696. These enactments present many considerations on which we need not dwell, and it may suffice to say that neither of them has any operation upon payments in cash. If a payment in cash be not made under circumstances which render it fraudulent at common law, it is, in Scotland, unimpeachable. "The chief ground," says *Bell* "for the omission of payments in the enumeration of acts challengeable on constructive bankruptcy most probably was, that payments being the ordinary way of discharging obligations, and which does not naturally suggest the idea of embarrassment or insolvency, it was right to hold it as effectual, unless proved to be fraudulent, or subsequent to notice of the bankrupt's situation." With regard to alienations in favour of creditors, they are void if voluntary and made within sixty days before becoming bankrupt. There is, in the law of Scotland, no provision akin to our knowledge of insolvency, which, under the Act of 1696, can carry the avoidance beyond the sixty days; and the Act of 1621 avoids nothing except in favour of a creditor who has actually commenced his action, and then only avoids what has been alienated since diligence begun. The alienations set aside must be voluntarily as well as made within the sixty days. How far the word *voluntarily* in the Act of 1696 implies an intention to prefer, or how far it may be held to embrace all acts not legally compelled, I have no time to discuss. "The plain intendment of the Act of 1696," says *Bell* again, "was to comprehend all conveyances made to a creditor if directly or indirectly intended to

confer on him a preference over other creditors." Here this learned and very accurate author seems to ascribe to the law a hostility, to acts intended to prefer, and not to acts also which merely have the effect so to do. I am the more disposed to think that an intention on the part of the debtor is the thing prohibited by the Scotch law, because conveyances made in the usual course of trade are held to be exempted from the statute. Now, if the effect, and not the intention, were the object of the law, an exemption of transactions in the usual course of trade would be idle and repugnant, for, so far as the effect is concerned, a creditor may be preferred in the usual course of trade just as much as in the most unusual ; though, in regard to the intention, there is a wide difference indeed. But declining to pursue this topic, I have simply to remind the Council that, by the law of Scotland, all payments of cash are good down to the bankruptcy, and no alienations bad, except voluntary alienations made to creditors within sixty days of that event. If we look to America, we shall find the doctrine of the United States embodied in their recent Act. In that Act, 27th Congress, sec. 1, chap. 9, section 2, the following provision occurs :—

"And be it further enacted that all future payments, securities, conveyances, or transfers of property in contemplation of bankruptcy, and for the purpose of giving any creditor, endorser, surety, or other person, any preference or priority over the general creditor, of such bankrupt * * * shall be deemed utterly void and a fraud upon this Act."

Here the contemplation of bankruptcy and the corrupt intention of the bankrupt are clearly recognized and rendered indispensable. We come now, Sir, to the law of England. It is, in substance, the law of America, as I have just described that law. The legislation of the States is founded upon the well-established English doctrines. By the law of England, as I understood it, two conditions are necessary to constitute an undue preference ; one, a contemplation of bankruptcy, and the other, a purpose or intention in the mind of the debtor to give the creditor a preference. Let either of these conditions fail, and there is in England no preference. The cases

in which this principle is recognized are far too numerous to quote, and I shall merely read a paragraph from the last book on *Nisi Prius* :—

“To constitute a fraudulent preference, so as to avoid a payment made by a trader, it must be a *voluntary preference*, and made in actual contemplation of bankruptcy, it is not enough to show that the party was in such a state of insolvency and embarrassment as to render bankruptcy a probable event.”—Stephen’s *N. P.*, vol. 1, p. 640, quoting *Atkinson vs. Brindall*, 2 Bing, N. C., 225.

This author gives a very modern case. The doctrine involved will receive additional illustration from two decisions of Lord Mansfield, to which I shall hereafter direct the particular attention of the Council. Without, therefore, pressing the matter further just at present, I shall take the opportunity which is afforded me by this reference to the English law to answer the question put some time ago by my hon. friend opposite (Mr. Ross). He wishes to know whether the law of England would have decided the cases relative to Jaffray’s estate in the same manner in which they were decided by the Supreme Court. The Chief Justice in giving judgment in the case of *Trustees of Jaffray vs. Christian* seems to say it would. His language upon the point is this :—

“Much as has been said upon the English law in application to the present action, I am myself satisfied that under the 6th Geo. IV., c. 16, the defendant could not retain this money, because the proof in the case would have been sufficient to make it a fraudulent preference on the part of the insolvent, and therefore unprotected by that enactment.”

In the face of such a statement of the English law I hesitate to advance an opposite opinion. But I am unable, I confess, to adopt the views of the Chief Justice. It was admitted that there was no intention on the part of Jaffray to give Christian a preference. He did not know that Christian was his creditor. What he did was in the common course of trade. I may be wrong, but as at present advised I should certainly say Christian would, in England, have retained the money. I have thus, Sir, laid before the Council the rules adopted in different countries. Those rules, as I already

intimated, are by no means uniform or consistent. But none of them, it will be observed (with the exception, perhaps, of Holland), are so stringent in their operation as those which now prevail in this Colony. In this state of uncertainty,—and placed as we are amidst conflicting precedents,—we shall do well to retire a little from the consideration of what is actually, in various places, found to exist, and endeavour to ascertain, by the application of first principles, what should be the leading object of our legislation. If we can once settle the end to be pursued, the task of devising the means to attain that end will be comparatively an easy one. I have lately heard something from the Court to the effect that the object of the law was to collect for the creditors of the insolvent estate the largest possible amount of assets. But this is certainly not so. If it were, we should go much more sweepingly to work. We should set aside all transactions for the last five years, or even declare the effect of insolvency to be to bring all creditors into community from the time the insolvent began business, recover all alienations and payments ever made, and proceed to distribute upon a new principle. But everybody feels that such a course would never do. The added assets would be much too dearly bought. Well, then, if this be not the proper object of the law, what is it? I answer boldly to check fraud and partiality, and nothing else. If we did not find that men tottering upon the verge of insolvency are often tempted to give undue advantages to relatives and friends, and to take upon themselves to defeat, by favouritism, that equal justice which the law encourages, we should have no ground whatever for any legislation. That one creditor is found to have come better off than the other creditors is nothing, provided his advantage have been obtained consequently and not intentionally. Time and chance happen unto all men, and especially to men in trade. Those who play at bowls must expect rubbers. One man gets, in instances, a better price for his merchandize than his neighbour does. In some other instances, the man who has had worst luck in that transaction chances to get his money out of some common debtor who is in difficulties, when the party who was successful before remains un-

paid. The cautious man, content with certain gains and small, deals for cash. The confident man, determined to do a dashing business, gives credit freely. Sometimes one of these men succeeds best, and sometimes the other ; all depends upon those accidents of business amongst which the coming safest out of an insolvent estate is one. To equalise the condition of creditors, in such cases, is a wild and visionary notion. But one thing we may do ; we may discourage intentional favouritism and fraud, and prevent insolvents from voluntarily distributing amongst their friends, or it may be their confederates, the assets which should go amongst the creditors at large. Look, then, to the motive of the man. If the purpose be to give a preference, avoid the act. If that purpose be absent, do not interfere. Upon this point Mr. Justice Menzies holds an opposite opinion, maintaining that you should regard alone the effect of the act, and not at all the motive, purpose, or the intention with which it was performed. In his last observations, page 14, he says :—

“ If the question were whether an insolvent should or should not be punished for doing any act which had the effect of benefitting one creditor at the expense or to the prejudice of other creditors, the motive or intention with which the act was done by him might with perfect propriety, and ought to be, made the criterion by which his liability to be punished ought to be determined. But I have been unable to discover any reason in respect of which the motive or intention with which any act was done by an insolvent, and not the effect which was the necessary consequence of the act, should be made the criterion by which it should be determined whether such act, in a question with other creditors who have been prejudiced thereby, should or should not be set aside.”

It appears to me, Sir, that this reasoning is not hard to answer. In truth it is not so much an argument to prove that what has the effect to prefer should be set aside, as an argument to prove that it is unreasonable to set aside an act merely on account of the insolvent's bad intention. But no objection against causing the validity of the payment to depend upon the state of the insolvent's mind when making it can be consistently urged by any advocate of the

existing law. Why is it necessary that the debtor should know himself to be insolvent? Why not have declared fraudulent all payments made by any person being, at the time, actually insolvent? This is done by this very Ordinance as altered for, and enacted in, New South Wales. It might have been done here. Can Mr. Menzies discover any reason in respect of which the state of mind in which any act is done by an insolvent, and not the effect of that act (which effect is just the same whatever the insolvent's state of mind may be), should be the criterion for determining whether that act should or should not be set aside? When I have had occasion in Court to advert to the necessity of knowledge on the part of the insolvent, the learned Judge has readily admitted that necessity. He has admitted that although the man were, in point of fact, insolvent one hundred times over, sunk in his fortunes beyond all possibility of rising, yet if he did not know the state of affairs, his payments are as valid as if he were backed by the Bank of Amsterdam. Under these circumstances, how can he maintain that the effect of the act, and that alone, is the thing to be regarded? Does not the effect of the act depend upon the state of the insolvent's affairs, and not upon his knowledge of that state? Mr. Menzies, himself, has often stated the reason of the present law. When men once know themselves to be insolvent, says he, the law presumes it to be their duty to surrender their estates, and when they neglect that duty, the law interposes to put things, as much as possible, in the same state as if the duty had been performed. The policy of such a principle is very doubtful. Many a man in great difficulties has hoped on, and struggled on, and at last made his fortune; and I am not friendly to the system of coaxing people to give up their estates. But I waive all such considerations, and ask whether it is not as reasonable to set aside a transaction because in it the insolvent transgressed the duty of not favouring particular creditors, as to set aside a transaction because in it the insolvent transgressed the duty of not surrendering his estate? Is it not infinitely more reasonable to set aside a transaction upon the first ground than upon the second? To say that it is the easier to prove that a debtor knows himself to

be insolvent when he makes a given payment than that he intends to prefer (which, by the bye, I don't admit), is not to the present point. That point is this, that Mr. Menzies cannot consistently object to connect the validity of a payment to a creditor with the state and condition of the debtor's mind, since it is as much connected with that state and condition in Ordinance No. 64 as in the Bill now before the Council. The test, in both instances, is a moral test. The difference is, that I prefer one moral test and Mr. Menzies another. But the effect of the act, as separate from the moral test, is no more his criterion than mine. And here, Sir, I am reminded of the old adage that extremes meet. The argument which I have been just combating, and which would set aside transactions irrespective of the motive in the mind of the insolvent, is the same argument which is adduced to sustain all transactions in which actual collusion between the insolvent and the creditor cannot be substantiated. What have the creditors' prejudiced, says one party, to do with the insolvent's motive? Nothing whatever, therefore set aside what has had the effect to prejudice them. What has the creditor paid, says another party, to do with the insolvent's motive? Nothing whatever, therefore support what is, as far as he is concerned, a fair transaction. Here you perceive that my hon. friend, the Auditor-General, and my hon. friend opposite (Mr. H. Cloete) occupy common ground with Mr. Menzies, though moving from it in a precisely opposite direction. But as against both parties, I maintain that the motive of the man is the thing to be got at and that upon that, and that alone, can the validity of the transaction properly depend. When there had been no motive to prefer, other creditors, no doubt, may lose; but if they lose they are injured, for such a loss is a contingency upon which all creditors must calculate. And on the other hand, where there has been an intention to prefer, there is little hardship in requiring the creditor to refund, since, even if there have been no collusion, the preference being the voluntary act of the insolvent, may be considered, to a certain extent, in the light of a donation, and so comes within the scope of some reasonable principles which have already been

explained. The money, indeed, was due. But the preference was a gift, and may be viewed in the same light. For my own part, I do not see how you can either dispense with the motive of the insolvent himself, or require actual collusion between the insolvent and the creditor, without admitting very great, though precisely opposite evils. But general propositions do not satisfy. Let us, then, consider two very important decisions of Lord MANSFIELD, reported in *Cowper*, which I hold in my hand. The circumstances of one of these cases will serve to illustrate a good deal of what I have been saying, while the observations of the Lord Chief Justice upon both are pregnant with instruction. The first case to which I shall refer is that of *Harman and Others, Assignees of Fordyce, vs. Fishar*, at page 117. The following are the circumstances as stated upon the case reserved for the opinion of the Court :—"Fishar was a creditor of the partnership of Fordyce & Co., and on many occasions had done them many acts of friendship, and being already a creditor for £1,300, on the 6th June, 1772, paid into the shop of Fordyce & Co., as bankers, the further sum of £7,000, which he had borrowed for the purpose of accommodating the shop during the holidays, and which he had written in his book in the usual manner, telling the clerk to whom he paid the money in that he should not draw it out before the Friday following, which they were told accordingly. On the 9th June, Fordyce sat up all night, settling his books and affairs in *contemplation of absconding*, and having in his separate right the two bills of exchange for which the action was brought, about five o'clock in the morning he enclosed them to Mr. Fishar in a letter, as follows :—"Mr. Fordyce, conceiving that the money lodged by Mr. Fishar with his house on Saturday last was a sum which, perhaps, some pains were taken to place there, he has the honour to *show him that preference* which he conceives is certainly his due." The letter was given to a clerk to deliver, who at ten o'clock went with it to Fishar, who was from home, and who was not to return that day. The clerk brought back the letter. At half-past eleven o'clock a commission issued upon the act of Fordyce in absconding. Next day James, a partner of Fordyce's, sent for Fishar and gave him the letter,

who, having read the same to the company present, took the notes away with him. Whether the plaintiffs as assignees were entitled to recover in this action was the question for the opinion of the court." The case was twice argued, by Butler and Lee for the plaintiffs, and by Allen and Dunning for the defendant. I omit all reference to the arguments of counsel and come at once to the luminous judgment of Lord MANSFIELD, of which I shall read a few of the more important portions :—"The defendant, Mr. Fishar, is certainly a very meritorious creditor of Mr. Fordyce, and in this last transaction did him a very great act of friendship. I have therefore been very sorry, as far as one can be said to be sorry in the administration of justice, that I could not see in this case any circumstances which could give rise to a question. * * * * There has been much argument upon a general question :— 'Whether a trader in contemplation of bankruptcy can give a preference to a *bona fide* creditor?' Perhaps the stating it as a general question involves a great impropriety, because no trader *can do an act of fraud* contrary to the spirit of the bankrupt laws and to the injury of his creditors. * * * * In the case of *Lorton vs. Bartlett*, decided in the Common Pleas, it was determined that, though the act be complete, *yet if the mere and sole motive of the trader were to give a preference*, it shall be void. In that case possession of the goods assigned was taken by the the creditor, *nor had he the least knowledge or suspicion of the insolvency*. But the material circumstances which made that a fraudulent act are these. The creditor did not arrest, or threaten, or even call upon the bankrupt for the money ; but the bankrupt of his own *voluntary* act gave him the assignment. With what intent ? Why, to give him a preference. Upon what was the opinion of the Court founded ? Upon the trader's giving a preference, and upon his sole motive being so to do. If he can give it to one he can give it to another, which would establish this principle, that a bankrupt may apportion his estate amongst his creditors just as he thinks proper. * * * * But the present case affords no circumstances that can give rise to a question. A trader at five o'clock in the morning, just going to commit an act of bankruptcy, orders his servant to take certain bills

to a creditor in discharge of a debt, pursuant to no contract, in performance of no obligation, in no course of dealing, without the privity of the creditor or call, on his part, for the money." His Lordship gave judgment for the plaintiffs, and the three other Judges concurred. The other case to which I desire to call the attention of the Council is that of *Rust and Another vs. Cooper, Cowper*, page 629. It was a pretended sale of goods made in satisfaction of a debt. I shall not trouble the Council with the circumstances, which are rather complicated and not important. In the course of his judgment, Lord MANSFIELD said :—"How does this case stand then? Was there any application on the part of the creditor? Did the creditor demand payment? Did he threaten process if the bankrupt did not pay? Not one of these circumstances appear. On the contrary, the whole was transacted behind the back of the creditor. * * * * There is a fundamental distinction between an act like this and an act done in the common course of business. The statutes have relation back only to the act of bankruptcy. And I consider that here there was no act of bankruptcy till the 26th September, the bill of parcels having been delivered to Cooper on the 24th. If, in a fair course of business, a man pays a creditor who comes to be paid, notwithstanding the debtor's knowledge of his own affairs, or his intention to break, yet being a fair transaction in the course of business, the payment is good, for the preference is then got *consequentially*, not by *design*. It is not the *object*, but the preference is obtained in consequence of the payment being made at the time. Suppose a creditor presses his debtor for payment, and the debtor makes a mortgage of his goods and delivers possession, that is and at any time may be a transaction in the common course of business, without the creditor's knowing there is an act of bankruptcy in contemplation, and therefore good. It is not to be affected by what passes in the mind of the bankrupt. But in the present case there is not a single thing but what is a step towards fraud *and a proof of an intended preference*." Sir, I have gone so fully into those two cases because Lord MANSFIELD is a great and venerable authority in mercantile law; because the cases are leading cases; and because, making allowance for some

temporary fluctuation, they seem to me to embody the doctrines of the ablest English lawyers. I oppose those doctrines to both the classes of opponents with whom I am at issue. I oppose them to Mr. MENZIES when he would seek to make the effect of the act done and not the motive of the act done the test of stability. Motive in preferences may be hard to judge of, but so is malice in murder. I oppose the same doctrine to my honourable friends, who seem to deny that the mere motive of the debtor should ever deprive the creditor of the payment made. In certain cases, indeed, it will not deprive him. Lord MANSFIELD says so, and the reason of the thing is clear. But that we are to lay it down that every alienation and payment is to stand good, unless besides the intention to prefer upon the part of the debtor the trustee can prove positive collusion between the debtor and the creditor, would go, I think, too far. What collusion was there on the part of Fishar in the first case quoted? He knew nothing of what Fordyce was doing, and was wholly passive from beginning to end. He was a meritorious creditor; his debt was paid to him; he did not forcibly reject it, and that was all. Now are such payments to stand? They will stand if collusion is essential. They will not stand if the immoral motive of the debtor considered as the sole cause of the act is to be, of itself, a sufficient ground of invalidity. It may be said that the act of receiving a payment, made not in the common course of business, is proof of collusion. I scarcely think so. But agreeing as I do to protect transactions in the usual course of trade and dealing, if you agree to call every transaction out of that course collusive, our difference would come to be more about words than things. But I am for leaving all collusion out of the case, because, although there will seldom be a distinct intention on the part of the debtor to give the preference without some suspicion of connivance or collusion on the part of the creditor receiving it, yet cases may occur in which both circumstances will not co-exist, and, for the reasons given, I see no hardship in requiring a man to refund a species of donation. It would be to strain the meaning of the word collusion, and palter with it in a double sense, to call everything collusion where the debtor designs a preference for the creditor, and

the creditor does not refuse the preference bestowed. Upon the other hand, Mr. MENZIES goes to the opposite extreme. He does not require collusion between both ; he does not require an intention on the part of either ; if the effect have been to prefer, no matter what the intention, he is for setting the transaction aside. Between these extremes we are safest in the middle. When you can prove an intentional preference but can prove no collusion, set the transaction aside and admit the creditor to prove his debt. When you can prove collusion on the part of the creditor as well as intention on the part of the debtor, set the transaction aside ; and do more, declare the fraudulent creditor to have forfeited his debt for the benefit of the creditors in general whom he had designed to cheat. But intention, purpose, design,—these I conceive are essential to the very nature of an undue preference. And I cannot but think that Mr. MENZIES himself concedes the principle. I have already discussed the inference to be drawn from the provision of Ordinance 64—that the debtor must not merely be, but must know himself to be, insolvent, in order to vitiate his payments. In pages 13 and 14 of his last remarks, the Judge seems to admit, not merely that the insolvent should know himself to be insolvent, but that he should also know that the effect of his act would be to prefer. As the law stands, this second degree of knowledge is not required, and it is something widely different from the first. Indeed, it comes very close to an intended preference, for a consequence clearly foreseen will frequently lead to the conclusion that the intention was to bring about the consequence so foreseen, and at all events it proves indisputably that the insolvent's state of mind is the matter to be determined. Again, it will be seen at page 11 that the Judge agrees in the propriety of protecting payments in the usual and ordinary course of trade or business. But why ? Has not a payment made by a man who knows himself to be insolvent in the usual course of business just as much effect in preferring as any other payment ? To say that payments in the usual and ordinary course of trade and business should be protected because there is not discoverable in them any intention to prefer is a good reason. But it is a reason which the learned Judge

cannot consistently advance. I am asked, however, to define the nature of the corrupt intention, and to state distinctly what sort of evidence will prove it. The great length to which my observations have already extended warns me to be brief here, and not to dash into a large discussion. By an intention to prefer I mean, and I conceive the law of England means, a voluntary and spontaneous design to give to one creditor what would not be given to other creditors similarly situated—a preference contemplated as such, and as such constituting the motive of the act—a principle of choice and selection extended towards favoured parties—an advantage bestowed by the insolvent by an act in which he has really been, directly or indirectly, the first mover. The existence of this criminal intention is a question of fact, to be tried by the same rules of evidence as regulate the proof of other criminal intentions. Alienations and payments made not in the usual course of trade or business would, of course, if unexplained, be pregnant evidence of an intention to prefer. Let us take the case of a bank of issue and deposit under a heavy run. It often happens that, from one reason or other, or from no reason at all, such a bank continues paying long after it knows itself to be insolvent,—nay, long after it contemplates bankruptcy as inevitable. While matters are in this state the doors are open, and the public, at no small loss of temper and coat tails, keeps rushing in to get its money. Orders are issued to the messenger to be ready to clap up the shutters in an hour. But during that hour numbers come and go, and change their notes, and draw out their deposits. I say that the knowledge of the bankers that they are insolvent—the contemplation of the bankers that they must stop—the actual arrangements made by the bankers for shutting up—are nothing to the public who, in the fair course of trade, are pressing for payment and getting paid. Desirous to do the best they can for themselves and their own interests, they are not to be affected, as Lord MANSFIELD says in *Rust vs. Cooper*, by what is passing in the bankrupt's mind. But suppose that, after orders given to close the bank, the bankers send in an envelope to a particular creditor the amount of his deposit, or can be proved to have despatched a

messenger to a particular creditor, telling him to come in haste for a deposit which they have kept back and mean to pay, should such a proceeding be allowed to stand ? The payments at the desk to the alarmed creditors are good, because they were in the common course of business ; the knowledge of insolvency, or the contemplation of it, should not affect it. But the payment sent in the envelope is bad, because it was a spontaneous preference on the part of the debtor, and not in the common course of business. And the payment obtained by the creditor with notice of the corrupt preference is bad, and more than that, it is a ground for forfeiture of debt, because the creditor acceded to, and actively adopted, the fraud of the debtor, and justly deserves that some penalty be imposed. The views which I am advocating strongly tend to the protection of trade and dealing, particularly where they are viewed in comparison with the principles of the existing law, which seem to me to rate much too low the evils of annulling past transactions. I have heard it said, Oh ! where's the hardship ? Does not the creditor who refunds come in for his proportion of the increased assets ? True. But still he must refund, and that I hold to be, in itself, a hardship of vast magnitude. "The greatest happiness of the greatest number" may do very well for Bentham to theorize about, but the evil to the individual who is required to restore what he has received may far outweigh the benefit, when diminished by division, which the great body of the creditors acquire by the reduction of the payment. Between the hardship of never getting your money at all, and the hardship of being compelled, after an interval of more or less duration, to refund your money which has once been paid, the difference is immense. In the one case you know the worst at once and arrange accordingly. In the other case you may have invested the money where you cannot realize it on the sudden, or you may have spent it out and out, never to realize it at all. But still the summons issues ; the cause comes off ; the judgment is given ; and if your assets immediately available are not sufficient for the payment of the amount, then you yourself become in turn, according to Mr. Justice MENZIES, an insolvent person, and can, being such, make no valid payments ; and so the game goes on, each person as he

falls, as in the child's play called the King of Prussia's exercise, knocking down his neighbour, until a state of general prostration is found to have resulted.

Mr. Ross :—Probably nine-tenths of the creditors will be absent from the colony, and it is only the unfortunate remainder that are called upon to pay.

ATTORNEY-GENERAL :—I have already adverted to that contingency, which should not be altogether overlooked. Sir, viewing the position in which we are placed, and the various systems which are elsewhere established, I recommend the adoption of the English principle, as being, upon the whole, the best we could select. But I am not altogether satisfied with the strictness with which the English law requires proof that the bankrupt contemplated bankruptcy when he gave the voluntary preference. Mr. MENZIES has justly remarked in his recent observations, that if the contemplation of a sequestration be essential, payments made with the most barefaced intention to prefer may hold good. Take this case. I, knowing myself to be insolvent, set about arranging a composition with my creditors. I offer ostensibly five shillings in the pound. But to the Treasurer-General, who sits beside me and is a favourite, I give twenty shillings on his debt. Some creditor, sharper than the rest—my friend the Collector of Customs would be too simple for such a thing—finds out what I have been doing for the Treasurer, declares off, blows up the composition, and so I surrender my estate. Is, then, the Treasurer to keep the money which he had received? He will keep it if contemplation of sequestration be a condition of restitution; for, although I intended to cheat my other creditors when I favoured him, I intended to cheat them contemplating a composition and not a sequestration. For my own part, I see no good reason for settling very nicely the state in which the insolvent's circumstances must be when he makes a payment tainted by a corrupt design to give a preference. I am not sure, indeed, that you might not rest the whole validity of the transaction upon the proof of that corrupt design. Where that design exists conscious insolvency must exist as well. To talk of Coutts, the banker, intending in his

lifetime to prefer a particular creditor by paying him, under any circumstances, either in the course of trade or out of it, his just debt, would have been sheer nonsense. Why? Because Coutts was worth a million or two above all his debts. Where there is plenty for all there can be no preference of any. Upon the other hand, a payment made whilst the party is proved to have contemplated a sequestration of his estate raises a strong presumption of intended preference. The two matters are so connected with each other that one of them being discovered the other will probably be found in company. But still, for the reasons already glanced at, I should have considered that, so long as a corrupt intention to prefer was required by law in order to avoid a preference, the other condition might have been left to general words, such as "being insolvent," or "incapable of paying debts due and demanded," or some similar expressions not importing that exclusive reference to a particular mode of winding up the deficient estate which is involved in the term "contemplating a sequestration." But I do not feel that I ought to press such a view against the opinions of men of more mercantile experience than myself, and besides I am anxious, by sticking to the English principle, to afford to the administration of the law in this Colony the advantage of the English decisions. Where we conveniently can, we ought, in such branches of the law as that which we are now debating, to follow in the footsteps of Great Britain. I am, therefore, an advocate for the introduction of the English principle in regard to undue preferences. I have now done. I have shown you what the present law is, and how it operates. I have shown you that it is of a much more destructive character than any similar law elsewhere established. I have shown you in particular how much at variance it is with the principles of the greatest commercial country in the world, England. I have shown you that it is only to be restored to a proper state by applying the moral test in determining the validity of transactions between creditors and debtors. I have shown you that that moral test must be held to be the mind and motive with which the debtor acts. And if it be said, as it may be said, and may be said with justice,

that the proposed alterations will furnish additional facilities for fraud, I can only answer that all legislation upon such subjects must be determined by balancing opposite evils, and that, in my opinion, the evils of occasional fraud are more tolerable than those of perpetual uncertainty.

ON THE DUTCH REFORMED CHURCH BILL.

[*Legislative Council, November 7, 1843.*]

The ATTORNEY-GENERAL presented a petition relative to the Dutch Church Bill from the Presbytery of Cape Town, which he moved should be read.

ATTORNEY-GENERAL :—Before proceeding to the second reading of this Bill, I should like to say a word or two, and but a word or two, with reference to the memorial of the Presbytery of Cape Town. In carrying any measure connected with the Dutch Reformed Church, I can safely say for myself, and as safely for your Excellency and this Council, that the great and paramount object has been to give, as much as possible, contentment to the members of that respectable community ; and it was only for the purpose of dispelling the mistiness and haze which hung over the subject of Church Law—of bringing into light, and placing in a fit position, important points involved in some obscurity—that, with your Excellency's approbation, I undertook to frame the Ordinance which is now upon the table. Under these circumstances, it has been to me a source of sincere gratification that the principles of that Ordinance have, in general, met with the approbation of the Church for whose benefit it was intended. Dr. Robertson has, in his judicious observations, referred to some points of detail in regard to which he suggests improvements, to some typographical errors which have crept into

the printed draft, and to one or two points of more importance ; while the Cape Town Presbytery, in their memorial, seem to take new ground, and to put forward principles of which I had not previously been aware of the existence. The leading topic embraced in the memorial is one upon which I need not dwell, because my honourable friend the Auditor-General, who knows the constitution of the Dutch Reformed Church right well, and is perfectly acquainted with the relation in which it stands to Government, has declined to support or countenance the view taken by the Presbytery, although friendly to the general spirit of the memorial itself. I understand the Cape Town Presbytery to draw a distinction between what they call fundamental laws and laws not fundamental ; to maintain that the laws which regulate the connection between the Dutch Reformed Church and the Government of this Colony are fundamental laws, and to maintain that all fundamental laws are withdrawn from the legislative powers of this Council, and are matters with which we have no authority to interfere. I am not able, as at present advised, to concur in this opinion. I do not know where the Reverend Presbytery gets its notion of a fundamental law. I see no reason why the Church Regulations of Commissioner General De Mist should not be considered as much within the legislative power and province of this Council as any other law or ordinance of that gentleman, his Regulations for the Orphan Chamber, or any other of his legislative acts. The Presbytery of Cape Town has not adduced any legal reasoning in support of the legal opinion which it advances ; and, under these circumstances, I can only declare my dissent from that opinion, and recommend your Excellency and the Council to await the report of the learned Judges, who will, of course, declare that there is a legal impediment to the working of this Ordinance, in case the passing of such an Ordinance transcends the powers of this body. If, upon the other hand, the Judges should report no impediment, I should say that we may proceed without any apprehension, and pass a law which is so very much required. Turning now from this topic, I should wish to advert to a somewhat important point referred to in Dr. Robertson's

letter to myself. It will be observed that the 6th section of the Ordinance, while declaring the right of the Governor to present to vacant congregations, restricts his choice of presentees to the ministers of the Dutch Reformed Church. Dr. Robertson doubts the expediency of this restriction as it stands. But some limit there must be. We must all concur in that. No one can maintain the right of the Governor to send an Episcopalian to preach in a Presbyterian pulpit, or send an Arminian to preach in a Calvinistic pulpit, or send an Arian to preach in a Trinitarian pulpit; and, upon this principle, it appeared to me that the Governor, in supplying vacancies in the Dutch Reformed Church, might properly be confined to choose from amongst the ministers of that Church. In questioning the propriety of this provision, Dr. Robertson adverts to the fact that circumstances have heretofore led to the introduction into several colonial pulpits of ministers belonging to the Church of Scotland, and that the cause of godliness and morality has not suffered in their hands. Sir, I think I shall carry with me the unanimous concurrence of this Council, and be supported by the opinion of the great body of the Dutch Reformed Church community out of doors who are of colonial birth, when I say that the men who have been received from the Church of Scotland have devoted themselves to the work of the ministry and the service of their flocks with a degree of zeal and earnestness which have not been without their reward, and which have commanded the love and veneration of the people committed to their care. Your Excellency may, perhaps, remember the striking evidence of this fact which was presented in the manifesto of the farmers at Natal—then in hostility to Her Majesty, but now happily submissive to her rule—when, in disclaiming the charge of regarding all natives of Great Britain with jealousy and dislike, they called upon the Scotch ministers who had lived amongst them while in the Colony to bear witness that they had never failed to evince towards those pastors that degree of confidence, cordiality, and esteem which they so well deserved. I am glad to bear my testimony to the high character which the ministers from Scotland have, as far as my information reaches, always maintained; and I am not aware that any one of them has superior claims to

general respect than the writer of this letter, Dr. Robertson, himself. This is my opinion. But in expressing it, I have said nothing which should preclude me from declaring another opinion, and it is this, that were I Governor of this Colony, and invested with the power of presenting to a vacant congregation, I should, of course, present no unfit man ; but, while rejecting every unfit man, I should feel it to be a duty, amounting to a moral obligation, to show towards colonists, duly qualified by life and learning, a decided preference.

The GOVERNOR :—Hear, hear.

ATTORNEY-GENERAL :—I should feel that in reference to parents who had, perhaps, made sacrifices to gratify the generous ambition of giving their sons a European education, it was the smallest reward that could legitimately be bestowed to put those sons to labour amongst their own people and in their own colony, in preference to ministers, however excellent, who had no such claims.

The GOVERNOR :—Hear, hear.

ATTORNEY-GENERAL :—The necessity which formerly led to the presentation of Scottish clergymen is not, perhaps, likely to recur ; and from the custom which prevails for young men not to confine their studies to the universities of Holland, but to devote a portion of their curriculum to Scotland, they naturally acquire, not merely new ideas, but such an acquaintance with the English language as enables them, when necessary, to perform their ministrations in that tongue. The duty of preaching now and then in English should never be neglected where there is any portion of the congregation likely to be edified by the practice. But this is a duty which, I should hope, our young colonial clergymen are, for the most part, fully qualified to discharge. If I may quote a living instance, I would say that I heard, some time since, in the Scotch Church of this town, a discourse from a colonist, the Rev. Mr Berrangé, couched in as elegant, racy, and idiomatic English as any man could desire to hear, and characterized, at the same time, by a reach of thought and degree of eloquence which would have done credit to any pulpit in Scotland, and might have been listened to with pleasure and advantage even by a people accustomed to the greatest preacher since St. Paul, Dr.

Chalmers. But while I conceive that colonists are entitled to a preference, and while I entertain the opinion that they will be found qualified, both intellectually and morally, in a manner to justify that preference, I would not cramp, or cabin in, the Church itself. The Church should be at liberty to recognize the ministers of any sister churches which she may select. The Church of England recognizes the priests of the Church of Rome, although the latter Church does not, indeed, return the compliment. The Presbyterian body of the north of Ireland recognize licentiates of the Church of Scotland as eligible to be called as ministers. On the continent there are Protestant Churches which are so much united in doctrine, discipline, and spirit that they mutually recognize the ministers belonging to each other. The Dutch Reformed Church may, perhaps, see cause to act upon some similar plan or principle. It may see cause to declare, for instance, that all ministers belonging to the Church of Scotland (either the "Free Protestant Church," or the party whom their opponents call the "Residuary Church," and who call themselves the Primitive and Proper Church) shall be eligible to be appointed to fill the vacancies within its bounds. But I should not take this matter out of the hands of the Church itself. The Governor should be entitled to appoint any ministers duly qualified according to the rules and regulations of the Church, but no other ; and I therefore propose to alter the conclusion of section 6 in conformity with this view. By this means, free and full authority in spiritual things is preserved to the Church, and all intrusion effectually excluded ; while, upon the other hand, the Governor will possess all that any patron can ever pretend to claim, the right of presenting parties declared competent by the authority of the Church. While on my legs, I may as well advert to another alteration which I mean to propose. It is connected with the 7th section. For the preservation of pure doctrine and Church identity that section requires adherence to the formulas of faith now received and professed by the Dutch Reformed Church. When I asked my reverend friend, Mr. Faure, whether or not this phrase "formulas of faith" might not, in course of time, become uncertain, he replied that such an

event was quite impossible, as there was no man, woman, or child who did not understand perfectly the meaning intended to be conveyed. But I have since then seen some reason to question the sufficiency of the test of doctrine as at first laid down, and I propose to make it more definite and distinct. I think I may state with safety that the Heidelberg Catechism and the Confession of the Synod of Dort (although I do not believe them myself) constitute the clear and undeniable standards of the Dutch Reformed Church, and as such I mean to move their insertion in the Ordinance—we need not specify in what year the Synod sat—it was that famous Synod that sent Barneveldt to the scaffold and established the five points of Calvin—and it appears that by an explicit mention of those authorities we shall shut out the possibility of such a state of things as may be witnessed in England, where the fluctuations of religious opinion have ended in placing much property in chancery, in putting much money into lawyer's pockets, in seriously inconveniencing the suitors, and in doing but small service to the cause of christian charity and good will.

ON THE GENERAL MUNICIPAL ORDINANCE BILL.

[*Legislative Council, December 18, 1843.*]

Mr. EBDEN presented a petition from the Municipality of Cape Town against the 5th clause of the General Municipal Ordinance Amendment Bill, which proposed “to authorize the Governor of the Colony for the time being, with the advice of the Executive Council, when and as often as he shall find reason so to do, to recall any Proclamation issued by the Governor for the time being, approving any municipal regulations.”

The ATTORNEY-GENERAL said:—I quite agree with my hon. friend who presented this petition that the tone, the temper, and

the wording of it, are altogether unexceptionable ; and I feel assured that there is no member of this Council, or of the Executive Government of the Colony, who will object to have any measure affecting, or supposed to affect, the interests of municipal institutions, canvassed in such a proper spirit as that which has been evinced by the Municipality of Cape Town. With regard to the feeling which is said by my hon. friend to be generally prevalent out of doors I am myself unable to speak, not having been into Cape Town for some days past, but I am surprised to hear of it. For my own part, I was, I confess, under the impression that the opposition to the clause in question was chiefly attributable to a learned friend of mine, who has, and who deserves to have, great weight and influence with the municipal body. Of that learned friend I speak with respect. I consider him an excellent lawyer, and I always hear his treatment of professional topics with pleasure and instruction; but upon the correctness of his reasonings upon moral and political subjects I regret that I am unable to bestow the same large measure of commendation. I believe that but for his observations in the *Zuid Afrikaan* newspaper the principle of this clause would not have been so much misconceived as appears to me to be the case. I speak of the principle, which I think good ; for the details, I admit, are faulty, and calculated to lead to inconveniences, which I have, this morning, been engaged in devising machinery to avert. To that machinery I shall return again ; but at present I confine myself to the principle, which I take to be this, that it is safe, convenient, and in perfect keeping with the existing system of municipal regulations, to vest the Executive with the power, as often as it finds that from oversight, ignorance of local circumstances, want of experience, or any other reason, some particular regulation has been approved of and published, which, had its nature and operation been previously known, would not have been so approved and published, to undo what it has itself done ; and that it is not necessary or convenient, in every instance in which a particular regulation, no matter what its comparative unimportance, may require modification, to resort to the solemn form of an Ordinance of this Council. This, I conceive, is the principle of the clause.

The details with which, upon reflection, I think it should be accompanied I shall explain just now. Is there anything in Ordinance No. 9, 1836, hostile to the principle which I have just stated? I think not. What is the principle of that Ordinance? To bestow certain large and important powers of a constitutional nature, which as proceeding directly from the Legislature, no municipal regulation should be able to alter or infringe, and to delegate to the householders and the Executive the duty of providing, by municipal regulations, for matters of detail. Landmarks were fixed by this Council, not to be removed; but it was considered that with regard to other matters of an inferior nature—the treatment, for instance, of pigs, pigeons, and other fowls—to adopt a favourite arrangement (matters on which our municipal friends are fond of discovering their ripeness for legislation, although not at all times in a manner which would excite the admiration of the Secretary of State)—it was not necessary that this Council should actively interfere; and that each municipality might be left, under the inspection of the Executive, to legislate for its own pigs, pigeons, and other fowls in whatever way it deemed the best. It might have been argued in 1836 that this Council could not delegate to the householders and the Executive Government the duty of legislating even upon those matters of a local nature and of mere detail. I presume, however, that what the Council did could have been well defended. But that question I am not called upon to argue. No one objects to that delegation. The petitioners recognize it fully; and the only matter for discussion is, whether anything is given to the Executive Government by this clause which comes to more than a following up of the provision of Ordinance No. 9, 1836? What is given to the Executive by that Ordinance? This is given: An arbitrary and irresponsible veto upon all regulations submitted. Subject only to their own sense of what is just, and to their general official responsibility to a higher quarter, they may veto every regulation that comes before them without giving, and it may be, without having, the slightest reason for the act. This every one admits; the *Zuid Afrikaan* admits it, the Cape Town Municipality admits it. How then can it be argued that

you are conferring a new and dangerous power, that you are introducing an anomaly, that you are subverting municipal institutions, when you propose no more than to bestow upon the same body, upon whose responsible discretion it rests whether or not there shall ever be any regulations published, the power of recalling, when circumstances demand it, their own act and deed? Which of these two powers is the greater? The Executive might say, in the first instance, to any given regulation, "We know the facts; we know this won't work well for the public generally; we veto it." No one denies that they might say this. Then if it shall appear that, with regard to any such given regulation, the Executive did not know the facts, or, knowing the facts, did not comprehend their working, how is it that the Governor is not to be at liberty, in case nothing else will serve, to recall the Proclamation which he himself has issued? You can only refuse this power to the Executive by supposing ignorance or corruption. But would not this ignorance and corruption have been a more valid reason for withholding the absolute veto in 1836? Is there not as much room for corruption in quietly extinguishing a regulation before publication, as in openly recalling it after publication? Is there not more room for ignorance in allowing parties to extinguish a regulation antecedent to experience, than in permitting them to withdraw it after the results have been perceived? Besides, bear this in mind. Regulations in the first instance may be vetoed in the dark. But you can never withdraw a regulation which you have once published without laying yourself open to the question, why do you now disapprove of that which you approved of formerly? And this necessity of supporting your own consistency is a check both upon corruption and caprice, which does not exist under Ordinance No. 9, 1836. This question should be viewed as if the clause in question had formed a part of the law of 1836. Could anyone who agreed to bestow the general veto refuse to bestow this inferior but connected power? If any one had done so, would not the absurdity of the whole proceeding have become evident, seeing that, after giving a veto to be exercised in a corner, it would be idle to refuse a power, from its nature, so much less

liable to abuse. The *Zuid Afrikaan* says, and says truly, and so does this petition, that Ordinance No. 9, 1836, provides that regulations once published are to be deemed and taken to be of the same effect as if originally included in the Ordinance itself. This proves that, when so published, they have the force of law. But the conclusion which is drawn from this fact, namely, that nothing but an Ordinance of this Council can change them, is unsound and contrary to the provisions of the Ordinance No. 9, 1836, itself. They may all be cancelled or changed and this Council be never the wiser. The householders and the Executive Government who created them may also destroy them. But can John a Nokes and John a Stiles, resident householders, combining with the Executive Government, have the power delegated to them to repeal an Ordinance of this Council? Certainly not. But an Ordinance of this Council may allow certain parties to form regulations which, when framed, are to have the force of that Ordinance; but still those regulations are not a part of that Ordinance, but may, if that Ordinance so provide, be amended, altered, or abrogated by the parties who framed them, or by either of those parties, as the case may be. Those regulations, therefore, have impressed upon them a character wholly distinct from that of the Ordinance which authorizes their adoption, and may consistently be governed by whatever rules convenience prescribes. But it said that what I propose destroys the principle of concurrent legislation. I do not think so. What is that principle? Why, that no municipal regulation shall ever be established with regard to which the Executive Government and the householders do not concur. It is admitted that if the municipality could make regulations without the Government, there would be no concurrent legislation. It is admitted that if the Government could make municipal regulations without the municipality, there would be no concurrent legislation. Does this Bill give to the Executive Government the power to avoid or alter any of the provisions of any Municipal Regulation? Had it run thus: "Whereas municipal regulations are liable to be published which might be improved; and whereas the Executive Government is the authority most competent

to improve them : Be it enacted that, as often as any municipal regulation shall be deemed faulty, it shall be altered or amended by the Governor as he shall think fit ; and such alteration or amendment shall thereafter be of like force and effect as if it had been contained in the Ordinance No. 9, 1836, anything contained in the said Ordinance to the contrary notwithstanding." Were such a Bill brought forward, I should admit that you were subverting the principle of concurrent legislation. But when it is recollected that the Executive Government originally may have amended or rejected any regulation sent in, and that all which is now sought is, to preserve to them such a power over their own act as is obviously essential to the due exercise of the function of amendment or rejection, I can see no subversion of the principle of concurrent legislation. When this power is exercised nothing is taken out of the hands of the householders ; they must still concur in framing their regulations ; the only effect will be to restore everything to its original state. But I go further, and state that the principle of concurrent legislation requires some such provision as that which we are now considering. Why ? Because, otherwise, the reciprocity is Irish, and the principle of change is all on the one side. The householders may go on suggesting changes at yearly intervals, but without some ultimate power the Executive Government can never operate in regard to change, no matter how necessary it may be. To-day a regulation is approved and published ; to-morrow, or a twelvemonth hence, for the period makes no difference, the municipality suggest a change. But if concurrence is to be the order of the day, should you not put the Executive in a proper position to suggest changes ? Under these circumstances I can see no danger in this measure, but on the contrary much convenience. I can see the objection to placing the consideration of Municipal Regulations in the hands of the Executive instead of retaining it in the hands of this Council. Perhaps there was some deviation from strict principle in so doing, but that the deviation, if any, has done good I do not hesitate to assert ; for had you as much experience of the condition in which municipal regulations sometimes come up as I have, you would agree with me that the due arrangement of them can be better accomplished

by the Executive Government and its machinery than it could be by this Council. The principle of Ordinance No. 9, 1836, may, therefore, be defended. It is founded upon the fact that there were two parties to be represented—one, the resident householders within the municipality, and the other, those persons, whether within or without the municipality, who had no voice at municipal meetings; and upon the expediency of permitting the householders to frame their regulations, giving to the Executive the power of protecting third parties. But unless invested with such a power as the clause under discussion would confer, the Government cannot conveniently and sufficiently discharge the duty originally assigned to it; and I therefore conceive that that power ought not to be withheld. I admit that this section is not well done. I admit that, as it stands there are just objections to it. It was done in haste. And allow me to state that it was done entirely by myself. Neither your Excellency nor any other member of the Executive knew anything at all about it. I am exclusively responsible, and am willing to take the responsibility. Being already engaged in framing some amendments of Ordinance No. 9, 1836, required for the settlement of some questions which had arisen, and which threatened litigation, I received from the Colonial Office certain papers regarding a municipal regulation in Uitenhage, of which complaints were made, and it struck me that if this regulation were as represented, an authority to the Governor to recall the proclamation containing it would be a simple and obvious mode of having matters settled on a more satisfactory basis. It so happened that I had no time to communicate with your Excellency upon the subject, and as the matter seemed to me of no great moment, I drew the section now before the Council. Let no one, therefore, affect to see in it any deep-laid plan to exalt Executive authority above any fair municipal privilege. God knows, the Executive authority gets nothing but trouble by meddling with municipal regulations at all; and they would be very well pleased to get rid of all responsibility connected with such things. Your Excellency and the other members of Government could have no design to trench upon civic rights, and I believe you have just as little desire; and, for myself, I may say

that I am neither in principle nor in practice hostile to the careful maintenance of every privilege to which representative municipalities can reasonably pretend. I did not, however, advert to some considerations to which I ought to have adverted. I did not consider that Government, by rushing suddenly in with a recall, might do what would unsettle the whole affairs of a municipality, and what, after all, might be avoided by a little previous communication. This great defect was brought to my attention by the tenor of a resolution proposed by Mr. Buchanan at a meeting of the Cape Town Municipality. I have, as I already stated, endeavoured to remedy this defect ; and without, at present, reading at length the provisions which I shall propose to substitute for the present clause, I shall now state what, so far as the power to be conferred upon the Governor is concerned, is their general nature. When the Governor finds, from representations made, that any given regulation, which was approved of, works in a manner which, had it been foreseen, would have prevented him from giving his approval, he is to be at liberty to inform the commissioners of his objections, and to state the mode, whether by amendment or recall, in which he considers that what is wrong may be made right. On receiving this communication, the commissioners will, within an appointed time, convene a meeting of householders, to decide whether the suggestion of the Governor shall be agreed to ; and, in case it should not be agreed to, then to decide, further, whether there are any other of the existing regulations which the householders conceive to be so dependent upon the regulation objected to that they would desire, in case the Governor's suggestion relative to the one be carried out, that the others should also be amended or recalled, as the case may be. This meeting is to be empowered also, in case it cannot agree to the Governor's suggestion, to accompany its rejection with such a statement of the grounds of its dissent as it may consider calculated to induce the Governor to change his opinion of the regulation to which he has objected. The decision of this meeting is to be transmitted within twenty-one days ; and in case of its not coming within that time, it is to be taken that the householders agree. If the meeting agrees, the Governor publishes the result. If the

meeting dissents, and gives reasons, the Governor considers them ; and, should he still see cause to object, gives notice in the *Government Gazette* that the regulation in question will be recalled at the expiration of twenty-one days. In case the householders dissent from the Governor's suggestion, but accompany their expression of dissent with the suggestion of certain dependent changes in the existing regulations contingent upon the recall of the regulation objected to, the Governor will consider those changes, and, if he sees no impropriety, make them at the time of recalling the regulation objected to, should he persevere in his opinion that it ought to be recalled. Should the Governor be unable to accede to all the contingent changes thus suggested, he shall give in the *Gazette* twenty-one days' notice that the proclamation containing the whole of the regulations, as well that which is objected to by him as those proposed to be changed by the householders, is intended to be recalled, unless, in the meantime, the matters in difference shall be mutually adjusted by the Executive and the municipality. During that twenty-one days the Governor will send back for the final determination of a meeting of householders the whole of the regulations in debate, amended in such a manner as he deems necessary ; and if, in this condition, approved of by the householders, they will be duly promulgated. But if no arrangement can be come to, pending the expiration of the notice in the *Government Gazette*, then the Governor shall recall all the regulations respecting which there is any dispute ; and thereupon they shall be deemed to be in the same plight and condition as if they had been then first submitted to His Excellency for his approval, amendment, or disallowance. These, and other provisions which I intend to introduce, will, I hope, be plainer on paper than they can be from my brief statement of them. They will, I trust, remove all well-grounded objection, and convince every candid mind that nothing is demanded for any other purpose than to be able to discharge efficiently the duty which now devolves upon the Executive Government. Objections, however, there still may be ; and I shall recommend a republication of the draft, in order to give an opportunity for them to be urged. When they come, if they do, I shall give them a careful, and I

hope, dispassionate consideration ; and will be happy, if convinced, to avow my conviction. But if the objection shall not seem *bonâ fide*, but appear to indicate a desire to carp, and find fault, and impute improper motives, I, for one, shall be prepared to treat them with very little ceremony, and to recommend to the members of this Government in Council, if they feel convinced of the uprightness of their intentions, and the reasonableness of the thing, to carry the amended Bill. I have stated that the matter which suggested to me the expediency of such a provision as that which we are considering was a regulation of the Municipality of Uitenhage. From certain papers which have lately been before me for report, it would appear, if I comprehend the whole merits of the case, that the Executive sanctioned, in September last, a regulation injurious to the interests of the coloured classes in the neighbourhood of Uitenhage. I may be wrong in this opinion ; such, however, was my impression, and at all events it was a case to be investigated. His Honour the Lieutenant-Governor clearly thinks we were precipitate. And in a matter of so much importance it is very desirable that we should have an opportunity of re-considering the subject. Without some power in reserve Government cannot negotiate with the independence which it should exhibit. Government wants to have no concern with, or responsibility for, municipal regulations. If this Council desires the duty, let it discharge the duty altogether. But if we are to co-operate with the municipalities, we should be furnished with the means of co-operating with effect ; and therefore I, for one, would be for either restoring to this Council the whole management of municipal details, or else for adopting a measure framed with the most studious anxiety so as to avoid all collision, and at the same time to allow the Governor to retain some power over his own proclamation. I hear it said, indeed, "Oh ! what need of such a clause ? The municipalities are bountiful, and will refuse no reasonable favour. Government, as it is, has only to go and speak prettily, and it will be patted on the head, and get what it asks for." But I hardly think that is the proper footing on which the thing should stand. Government should not be always suppliants when they are interfering solely for the general

good. And I must say that from neither of my hon. friends who have addressed the Council have I heard one jot or one tittle of anything that looks like argument. They have not offered the contingent remainder of a reason for the vote which they are prepared to give. Let it be always borne in mind that it is not proposed to allow the Governor to alter a single regulation, or to do more than recall his own act, when he finds that from deficient information the act is calculated to do harm. The *Zuid Afrikaan* admits, and so does its echo, the petition, that that which had the power to do should have the power to undo. If then, when all other means fail, and they will seldom fail when it is remembered that there exists an ultimate remedy in the hands of Government, recourse is had to the simple undoing of that which Government has done, how can it be argued that concurrent legislation in any rational sense has been subverted? Of course, I do not contend that the Executive should be permitted to repeal an Ordinance. But those regulations, as I formerly said, have a peculiar character, and are a species of legislation which must not be confounded with the Ordinance which authorizes them. By the Charter of Justice, an instrument of higher moment than an Ordinance, the Judges may make rules of court. Those rules, when made, are declared to have the same force as the Charter itself. Those rules are every day changed, and still no one asserts that the Judges can repeal the Charter; and a similar power in regard to recalling a regulation—no one pretends to publish a new one—when conferred by law, cannot be properly asserted to amount to a repealing of the Ordinance No. 9, 1836. I wish both parties, householders and Executive, to possess equal rights. I see no use in the provision that a year must elapse before the householders can amend, and I should relieve them from that provision. Other changes will be read in the new draft when published. With common rights and powers the public business will, I venture to say, be amicably managed. If the present system be continued—if we are to have no means of reconsidering our act—if what is once published must, as far as the Executive is concerned, remain for ever published—much delay will be inevitable. We

must walk warily. We must leave nothing to experience. That all regulations from the eastern districts should undergo the scrutiny of His Honour the Lieut.-Governor is only proper. But, besides, we must have special reports, from the civil commissioners, upon all points which seem to be of consequence. And there must be a long previous publication in the *Gazette*, inviting criticism. This will be the fruit of tying the Executive down to its first thoughts. But if, on the other hand, there shall appear to no candid man any reason for thinking that the power of reconsidering any regulation which the public object to is more likely to be abused than the power of repudiating all regulations in the first instance, then the right in question ought not to be denied. It may never be called into operation, but should it be so called, it can never operate but well.

1844.

ON THE QUITRENT ENFORCEMENT BILL.

[*Legislative Council, January 22, 1844.*]

The GOVERNOR stated his intention to withdraw the Quitrent Enforcement Bill, and to propose another in its stead ; a course which the Attorney-General would state the reason for.

The ATTORNEY-GENERAL said that, without entering into a particular consideration of the principle of the measure referred to by His Excellency, it would be sufficiently obvious to any person who had given it a perusal that its object was to stimulate the recovery of quitrent in arrear by as cheap and expeditious a course as possible, it being the conviction of Government that it was a favour ill bestowed to allow arrears to accumulate, where the money might, by a greater degree of pressure, be regularly got in. Everyone must see that the Court of the Resident Magistrate would, if allowable, be the most convenient court in which to proceed in cases involving no legal difficulties, and in which cheapness was desirable for all parties concerned. This was the course proposed by the Bill before the Council, which would have required the grantees of Government either to pay the rent or quit the place ; but it appeared to the Judges that, under the Charter of Justice, the Court of the Resident Magistrate could not have jurisdiction in such cases. It appeared to them that the title to lands and tenements came in question. He (the Attorney-General) had been misled by the distinction which he had been accustomed to draw at home between ejectment on the title and ejectment for non-payment of rent, the latter being a proceeding which did not question the title, which, on the contrary, in its nature affirmed title, but which merely went

upon the simple fact of condition broken. But yielding at once to the views of the Judges, he had prepared a new Bill, which would, he hoped, be found free from objection. It proposed in certain cases to allow the Civil Commissioner to seize the *invecta et illata*, and so levy the rent. In other cases it provided a safe and cautious machinery for recovering the land itself, through the Supreme or Circuit Court, when no person could be found to clear off the arrears. A practical difficulty belonging to the law of evidence was removed by allowing the entry of the title in the civil commissioner's books to be *prima facie* evidence of the grant, so as to obviate the necessity of sending down title deeds from Cape Town into the country. Upon the whole he trusted that the Bill would meet the end in view.

ON THE POLICE SUPERANNUATION BILL.

[*Legislative Council, January 22, 1844.*]

The Police Superannuation Fund Bill was read a second time.

The AUDITOR-GENERAL feared, as far as he was concerned, the plan was started rather too late in the day.

ATTORNEY-GENERAL :—It is related of James the First that, in a conversation with the Bishops of Chester and Gloucester touching his prerogative Royal, he asked those right reverend prelates whether he might not lawfully take their goods, by divine right, if he should stand in need of them? The Bishop of Chester said "Certainly;" but the Bishop of Gloucester said nothing. The King insisted upon his having his opinion on the matter. "My opinion on the matter is," at length returned the prelate, "that your Grace may lawfully take my brother of Chester's goods, for he himself offers them." Now, the police force are here in the same predicament as the Bishop of Chester. I am informed that the Judge and

Superintendent of Police lately mustered the entire force, and after explaining the advantages which were likely to be derived from the creation of the proposed fund, enquired whether or not they all agreed to the arrangement, to which they answered unanimously in the affirmative. There is, therefore, no difficulty in applying this principle to the case of the police. The same principle may, perhaps, apply equally to some of us, and whenever the Treasurer, the Auditor, the other members of Government, and myself, are called out on parade and asked the question, we shall probably be able to say whether we like a superannuation fund or not.

ON THE NON-OBLIGATION OF GOVERNMENT TO SUPPLY TO MEMBERS OF THE LEGISLATURE WHAT THEY CAN THEMSELVES PROCURE FROM PUBLISHED OFFICIAL SOURCES.

[*Legislative Council, March 4, 1844.*]

MR. EBDEN :—Is it said that all the information I have asked for is to be found in these *Gazettes* ?

ATTORNEY-GENERAL :—My hon. friend has asked whether all the information he calls for is to be found in the *Government Gazette*. In order to answer his question, let us see, by reading his notice of the returns he requires, how many of them relate to matters contained in the *Gazette*, and how many of them do not. By this means we shall be placed in a position to determine the two questions which are now before the Council ; first, whether matter duly published periodically in the *Government Gazette* should be put into ship-shape for the purposes of a given motion by the mover of that motion or by the Colonial Government ; and secondly, whether Government returns can regularly be made, rela-

tive to the other information called for by my hon. friend, and which belongs to matters not published in the *Government Gazette*. The first return, then, which is demanded is, a "Return showing the number of separate acts of depredations committed in the colony, by the native tribes, during the years 1837, 38, 39, 40, 41, 42, and 43, distinguishing the nature and extent of such depredation, *i.e.*, the number of horses, heads of cattle, or other descriptions of property reported to have been destroyed or abstracted from the Colony by the Kafirs." Now, your Excellency has distinctly shown that, as far as this return goes, the materials for making it, the materials from which Government must make it, everything necessary to give the fullest information upon every single point, are already in the *Government Gazette*, and so in the possession of my hon. friend, and it will unutterably amaze me to hear it asserted that in Parliament, or out of Parliament, or in any deliberative assembly whatsoever, it has ever been deemed to be the duty of Government to act as the amanuensis of any individual, or, by digesting matters belonging to the public at large, to do for him what he is equally able to do for himself. In Parliament, no doubt, members do every day move for returns, but of what? Of matter already published by authority? No; but of matter belonging to the arena of Government, of diplomatic despatches, of tables of exports and imports, and a variety of similar things which none but Government can give. But when the Government does actually publish periodical returns—returns which all who run may read—to say that this is not enough, and that when a motion is meditated by any member of this Council Government must go further and frame a digest of these periodical returns, seems to me a proposition incapable of being supported. If my hon. friend asked for anything which he has not already got, the case might be somewhat different. But everything he asks for, the time, the place, the owner, the number and description of the stolen animals, all, and more, are in the *Gazette*; and nothing is or can be wanted except the industry to sit down with the *Gazettes*, read the several returns, and add up, if it be thought necessary, the general result. But my hon. friend says that this task is too troublesome.

Mr. EBDEN :—No ; the Secretary says so.

ATTORNEY-GENERAL :—But so does my hon. friend. The Secretary to Government says that the trouble should not be taken by him, but by whom it may concern. Let my hon. friend set to work himself. No one ever heard of Joseph Hume asking Government to make up for him the “tottle” of any sum in addition. If the Government will give him the accounts he will always make up the “tottle” for himself. It may be convenient for my hon. friend to have so much labour shoved off his own shoulders. In the same manner it might be convenient for my hon. friend to be furnished with a return containing a digest of all the articles upon the frontier policy published for the last seven years in the *Graham's Town Journal*. But Government has no concern with any of these things. It is not going to digest the *Graham's Town Journal*. It is not going to digest the *Government Gazette*. Let my hon. friend take courage, sit down with the *Government Gazette*, and collect the information he requires. There is no glory ever gained except by toil ; and my hon. friend will never, let him take my word for it, obtain the renown of upsetting the frontier system without going down into the question and arming himself with the data by which that overthrow must be effected. We now come to the second call of my hon. friend, which is for a return embracing a general abstract of losses reported to have been sustained by the colonists of the depredations by the Kafirs during the above period, distinguishing their nature and extent, and whether reclaimable or not reclaimable according to the treaties. There is nothing new here ; and all that has been said already equally applies. There is not one iota of the information here demanded which is not to be found in the *Government Gazette* ; and all that is wanted is the merely ministerial act of “totting up” and “carrying forward,” an act which should be done by those who wish to use the result, and one which no other party is, or can be under any obligation to perform. My hon. friend, in the third place, wishes a return in detail of all acts of aggression, whether committed by the Kafirs or the colonists. We have here some new ground. The *Gazette* does not purport to give all that is required

by this return. But how, I ask, is Government to be called upon to frame a return of aggressions by colonists in Kafirland? Had my hon. friend limited his demand to a return of aggressions reported to Government I could have better understood him; but he wishes Government to take the responsibility of framing a return of all aggressions, whether reported or not. There may have been some cases reported from time to time. I know nothing about that. But this I know full well, that there are more serviceable sources of information open to my hon. friend. When he has exhausted the *Gazette*, let him fall back upon the Graham's Town papers and petitioners. These will supply all deficiencies, leave no aggression unmarked, keep back nothing, commit no sins of omission. Fourthly, my hon. friend calls for a return showing every breach of the existing treaties. We have here pretty much the same thing over again; but be that as it may, has Government, I ask, any peculiar means of collecting for my hon. friend the information which he seeks? What breaches of treaty he refers to I do not exactly understand. Every cattle theft may be called a breach of treaty. Every outrage beyond the boundary may be called the same. Perhaps the late expedition against Tola involved, upon all sides, a breach of treaty; and my hon. friend's contemplated return is meant, it may be, to involve a narrative of that transaction. But be the breaches what they may, every man upon the frontier knows them as well as does the Government. The cattle question he can settle very simply. Let him compute from the *Gazette* the number of cattle, reclaimable under treaty, which have been stolen by the Kafirs. Let him deduct the number returned or compensated, and the difference will show the breaches of treaty connected with cattle stealing. Then my hon. friend demands a return of the number of lives lost and assaults committed, and so forth. What peculiar facilities for telling this does Government possess? The only way, or at least the first way, in which Government hears of such things is by common report; and common report is as available to all other people—

Mr. EBDEN :—We do not ask the Government for what it cannot do.

ATTORNEY-GENERAL :—But I say there is no source of information open to Government which is not open to the public ; and Government is not to frame returns for people who can frame them for themselves.

The GOVERNOR :—All the information in the possession of Government is embodied in the remarks attached in the quarterly returns. The only breaches of treaty are connected with the stealing of cattle, all which cases are regularly reported.

ATTORNEY-GENERAL :—Then, my hon. friend asks for a matter, which is, I admit, no whit more unreasonable than the rest ; but one which is, in all conscience, quite unreasonable enough ; that is, for copies of the existing treaties. Those treaties are not locked up in the Colonial Office. They are printed, in all their length and breadth, in the *Government Gazette* ; but, not content with that, my hon. friend appears to wish that Government should cause them to be copied out and laid upon the table. Under these circumstances, I submit that my hon. friend cannot support his motion by either precedent or reason ; and that it should be negatived. He asks either for what Government has already given, or for what Government should not be called upon to give. He might as well move for a return showing the number of meetings held to petition against the treaties, and the number of harangues delivered thereat, or a return showing the state of feeling upon the subject of the treaties, or a return containing, as I said before, a digest of the able articles of Mr. Godlonton, or a return of any other matter whatsoever, which might facilitate the performance of the task which my honourable friend proposes to discharge. These are matters as open to my honourable friend as to anyone else ; and I really conceive that, except we agree, for the convenience of saving trouble to ourselves, to create a new officer, to be called returner-general to the Legislative Council, whose duty it shall be to collect and arrange such data as we may, for purposes of debate, from time to time require, we shall never be able to accomplish what my hon. friend appears to have in view. I am not prepared to assent to such a proposition, and I am as little prepared to assent to a motion requiring the Government to undertake so anomalous a duty. Let

me be permitted to say a word or two in explanation. I wish to assure my hon. friend, most unaffectedly, that in anything I have said, or shall say, I have no wish to offer him the least offence. What I said about renown was merely thrown in to enliven the discussion, and only intended to convince my hon. friend that it is a constitution of debate, indeed, a law of our nature, that glory can never be won without working for it. My hon. friend seems to acknowledge that he is not as yet master of his subject; and I, for my part, am quite willing to acknowledge that there are many things belonging to our frontier system which I do not altogether understand. But I say to my hon. friend, what I say to myself, that if we wish to imbue our minds with the necessary knowledge, we should draw water for ourselves from the original sources, and not allow the Secretary to Government to fill our cisterns for us. The whole question is harrassing and difficult. There is no royal road to the discovery of a sound border policy. It is not by succinct returns that the matter is to be determined, but by a patient consideration of circumstances and details; a consideration which must be given by ourselves or be completely profitless; for to suppose that, upon such points, we can become wise by another man's investigation would be as absurd as to suppose that we could become strong by another man's exercise. He who would be healthy must take the exercise himself; and I tell my hon. friend that he will never make a speech worth listening to upon the subject of the treaties until he has courageously gone down into the details of their working, and arranged his data for himself. My hon. friend, however, may view this matter differently; and if so, he has, of course, a right to hold his own opinion. But my hon. friend has said that he cannot disguise from himself that when, by the assiduity of the reporter present, our proceedings to-day shall go forth to the frontier, the frontier folk will see in them clear proof of an indisposition upon the part of this Council to give a fair hearing to their grievances. I think he is wrong in this conclusion; and I am sure the frontier people will be wrong if they take up the view which he suggests. The Secretary to Government has distinctly stated (and even his enemies will,

I think, give him credit for candour), that there is not the smallest wish upon his part to give the go-bye to the question, or to prevent its being fully and fairly argued. He has, in a great measure, rested his opposition to the present motion upon the labour which it would entail ; and I have no doubt that if these returns could be made by magic he would have had no objection to their production. Your Excellency has, I conceive, with equal clearness disavowed any desire to stifle any constitutional and legitimate discussion of the subject. My own indisposition to grant this motion is not rested so much upon the ground of labour and expense, although that alone is a sufficient ground, as upon the principle that if you once begin to cast upon Government the duty of collecting facts and totting figures, which are all open to the world at large, you will introduce a precedent which may hereafter be pushed to a mischievous extent, when returns of a still more unnecessary character are called for and refused, and what you did to-day will be pointed to as proving your egregious inconsistency. My hon. friend has said that similar returns are given to the House of Commons, and that he could produce instances. Those instances, however, he has not produced. Under these circumstances, I will not consent to give what I conscientiously think is not needed, because it may, perhaps, be said : " Oh ! the Government only wants to shirk the discussion." Sir, there is no more wretched cowardice than the fear of being called a coward. When men, who are, I hope, men of honour, deliberately declare that they have no wish to stifle any debate ; when my hon. friend, the Secretary to Government, is ready at the proper time to enter upon the question ; when I, as is my wont, will be prepared, fully and fairly to state my views, however unimportant, I trust it will not be supposed that in resisting an irregular motion we are refusing legitimate discussion. I am willing to appeal to the good sense and good feeling of our fellow-colonists upon the frontier. When I was there in 1840 they treated me right well. I was welcomed in Graham's Town with a splendid hospitality and kindness which can never be forgotten. The same people will not now believe that I am merely shirking a debate by opposing such a motion as that which is before the Council. So

much for the justification of the Council, and now for some advice to my hon. friend. He also is upon his trial. And let me warn him to take care that, when our proceedings reach the frontier, it may not be suspected that he himself, having no appetite for the discussion, and wishing, if he can, to shirk the question, takes a course which —

SECRETARY TO GOVERNMENT :—Hear, hear.

ATTORNEY-GENERAL :—That he, himself, I say, not willing to peril himself by any distinct or deliberate proposition, and not seeing clearly his way before him, desires, not unnaturally, I admit—I impute no improper motives—to give the gentle go-bye to the discussion by asking for what he knows cannot be granted.

Mr. EBDEN :—The best answer to that is that I ask for what the petitioners have requested.

ATTORNEY-GENERAL :—Do I blame my hon. friend for not coveting a debate upon a subject of so much difficulty and delicacy, embarrassed as it is, by so many collateral circumstances? By no means. I am very far from coveting that debate myself, though when called upon I shall debate it. I am not insensible to the existence of much and irritating annoyance experienced by the border colonists. I would, if I had any power, do much to relieve them. But I cannot allow myself to be carried away by a one-sided view of a subject which has many sides. I cannot, because I hear a great roar along our frontier line against Kafir depredations and inefficient system, at once rush headlong into a condemnation of the present treaties, when the only effect of breaking them down might be to let in upon the Colony a sea of troubles of which the surging might prove unspeakably destructive.

The GOVERNOR :—Hear, hear.

ATTORNEY-GENERAL :—When we are exposed to opposite evils, he maxim is, to choose the least. I will not assert that the treaties form the least of two evils. This would involve a more decided opinion than I am now prepared to express. When the time comes, if it shall ever come, I shall attempt an investigation of this question. In the meantime, not anxious for a discussion which can, perhaps, do little good, but, at the same time, not afraid to enter on it when

legitimately required so to do, I would beg my hon. friend to beware how, by making his promised motion contingent upon these returns, he may appear to the public to be shirking that discussion from which he is apprehensive that the Council may be thought to flinch.

IN PROPOSING LADY NAPIER'S HEALTH.

[*Government House, March 27, 1844.*]

The Hon. Mr. PORTER said :—My hon. friend, Mr. Montagu, has just proposed, in very proper and judicious terms, the health of a distinguished lady. He has given his reasons (and right good reasons they appear to be) for thinking that our society at the Cape is likely to reap many and solid advantages from having, at its head, the lady of the present Governor. I go cordially along with my hon. friend in his bright anticipations ; and so, I am sure, does every gentleman who hears me ; but still, while indulging the pleasures of hope, we cannot be insensible to the pleasures of memory. My hon. friend has done his part, and now I wish (would that I could do so in as fitting terms) to do my duty, and propose the health of another distinguished lady, Lady Napier. Sir, in my opinion this toast needs no laboured panegyric, and I shall pronounce none. But very lately most of us now here witnessed, in this room, an assembly collected in her honour, which was in some degree worthy of her character, and her health was then given by the Chief Justice, in terms which I shall not attempt to emulate. And since on that occasion Lady Napier's friends received the mention of her husband's health right well, I am the more completely satisfied that Sir George Napier's friends, this evening, will not be backward to return the compliment. Sir, if superior sense—if rare discretion—if rigid abstinence from all

meddling with matters which did not concern her—if a noble elevation above everything in the shape of small colonial cabals or coteries—if a resolute withdrawal from every avenue to popularity, however tempting, which might ever so remotely tend to hamper her husband's perfect freedom of action in regard to men or measures—if these, I say, be qualities which should commend the lady of a Governor to a company of gentlemen, then, gentlemen, I tell you that these were qualities possessed by Lady Napier in an eminent degree. Sir, you well remarked, when proposing Sir George Napier's health, that it is not easy to be a good Governor. This is true. But believe me also that it is not easy to be a good Governor's wife. A foolish, or an imprudent, or an ambitious woman, or a woman fond of gossiping or tittle-tattle, may, without meaning it, do an immensity of mischief. Lady Napier was of another stamp. And whatever difficulties our gallant guest may have encountered in his government (and he has encountered many), he has the high satisfaction of knowing that not one of those difficulties was created for him by his wife. Gentlemen, feeling that her husband's character and comfort were her great objects in this life, she judiciously consulted both by confining herself to the sphere in which she was legitimately placed; cheering and enlightening it with the mild radiance of native elegance and taste, dealing out impartial courtesy to all within her reach, and diffusing around her that large amount of happiness, which taste, and temper, and refinement, in elevated station, invariably communicate. And she has her reward; for when, on Monday next, she quits the Colony, she will leave behind her, not the character of a busy or intriguing meddler, or of that social mosquito, a petticoat politician—but of one who was the more to be admired because of the absence of all those vulgar elements which strike the vulgar gaze. Sir, there are few of us who have not, more or less, experienced her kindness. There are some here who have been privileged to know how much, in private life, she can add, by her gaiety and talent, to the fund of social animation and enjoyment. There are others here who have experienced that she can sympathize with sorrow, and comfort:

those who mourn. We all send with her our best wishes ; and I can ask, for my old and honoured master there, to whom I owe much gratitude for much kindness, no greater blessing than that she may long live to be to him what she has hitherto been, to double his joys, divide his griefs, and bless, for many and many a happy year, a home and heart that would, indeed, be desolate without her. Sir, I give you " Lady Napier's Health !"

IN ANSWERING FOR "THE LADIES" AT THE BANQUET TO SIR G. NAPIER, AND PROPOSING THE INDIAN VISITORS.

[*Commercial Exchange, Cape Town, March 27, 1844.*]

The Hon. Mr. PORTER said:—Although, Sir, I have not received the usual professional inducement to undertake this case, I am quite willing to accept it for love, and since it has, at all events, brought me up upon my legs, I may as well consider myself, upon this occasion, as *standing* counsel for the ladies of this Colony. And I do assure you, Sir, that, were it not that, despite all our conviviality, and good cheer, and good feeling, time rolls his ceaseless course, and that we have arrived at that period of the evening when, on ball nights, in this room, papas begin to look obdurate, and speak severely about keeping the carriages and the horses waiting, and daughters, who care for neither, beseech papas for " just one other little waltz, no more," I should endeavour to do some sort of justice to the inspiring topic which has already excited such visible enthusiasm. But that, alas, is now impossible, and really when I call to mind the brilliant manner in which Mr. Bushby introduced the toast, and the glowing imagery brought, I should say from eastern climes, of which he has been prodigal, I cannot be too careful not to lose myself in an attempt to follow him through the flowery

paths into which he has led the way. Under these circumstances I would I had a Bramah press, or some such potent engine, to condense what I have to say ; but one or two remarks, nevertheless, I must take leave to make. And first, Gentlemen, give me leave to tell you that although we (I class myself with my fair clients) are very much obliged to you for proposing our healths, we would be much more obliged to you to propose for ourselves. Fair speeches, after all, are only so much breath ; we do not, of course, absolutely disregard them ; but still, eligible offers are quite another thing, and deeds, not words, is our immortal motto. We have heard a great deal about a great and gallant Duke to-night. You remember, I doubt not, his celebrated exclamation (it is said to be fabulous, but it ought to be true), when, as the French Imperial Guard were sternly advancing to the attack, his eagle eye perceived that the time had come for a decisive charge, and he uttered the stimulating exhortation : " Up, Guards, and at them ! " Now, just fancy our young ladies to be fair enemies, enemies who ask no quarter, and who give none, and if any guardsman hear me, I would say to them, and to all others whom it may concern, " Up, Guards, and at them ! " Encountering such adversaries, they will, indeed, be inevitably vanquished. But it is a peculiarity of such warfare that wounds and captivity are blessings rather than otherwise, and that the glory of the warrior consists in frankly confessing himself conquered. Gentlemen, I am glad to hear you laughing. But it is no laughing matter to be called on twice within a fortnight, as I have now been, to speak to the same toast, even though that toast be " The Ladies." One very obvious inconvenience is, that the man who says all the good things he has to say on one night is certain to have nothing good to say the next. And as it cannot be consolatory to my feelings, as a single man, to dwell on topics of a connubial character, I can scarcely imagine the reason why I am thus paraded, except it be that, as the Spartans sometimes exhibited a drunken slave to deter their youths from intoxication, so you exhibit me as an unhappy old bachelor to frighten young fellows from celibacy. However, while there's life there's hope, and I will here whisper a state

secret. There is a committee now considering the Colonial Stamp Laws, and I think I may state, with confidence, that, in order to encourage the young ladies, and promote matrimony, my friend Mr. Montagu intends, if he can, to reduce marriage licenses from two hundred dollars down to one. For my part I am only waiting for the low price ; other old bachelors, I have no doubt, are in the same state ; and the result will be, I make no question, of a highly gratifying description. But now, Sir, we will tear ourselves away from the ladies, and I wish, with your permission, to propose a toast which upon this and upon every other occasion we are bound to receive with respect and cordiality. It is the health of our Indian Visitors. In reference to this toast I wish to be extremely brief. But I cannot pass over the two great classes of which those visitors consist without saying a word or two of each of them. And first, then, we know that many of our Indian visitors are officers of the Indian army. The reputation of that army never stood higher than it does at present ; and I cannot refrain from reminding the company that a great ornament of that army has just reached our shores. Mr. Ebdon, and myself, as two of your stewards, waited to-day on Major-General Sir William Nott, to request the honour of his company at this dinner. That gallant officer was pleased to say that he fully appreciated the compliment we offered, but that, although a good deal benefitted by his voyage, he could not venture here, immediately after landing, without imminent danger of a relapse. He would gladly, he said, have met Sir George Napier—the Napiers were all a gallant race—and Sir Charles a most noble soldier and most able man. Sir, we must all regret that the health of Sir William Nott has deprived us of the pleasure of welcoming, in this room, one of the heroes of Cabul. In every panegyric that has been pronounced to-night on the British army in general, the Indian army of which he was a leader is justly entitled to participate, for God forbid that any distinction should be made, or that the Sepoy, who, when well officered, is an excellent soldier, should go without his meed of honour. It would ill become me to dwell on the achievements of Sir William Nott. The wide world knows

them, and the Prime Minister of England, in his place in Parliament, has described them in a magnificent display of classic eloquence not to be forgotten. In circumstances of difficulty and discouragement, in the face of previous and terrible reverses, in fastnesses and defiles amidst which even the armies of Alexander wavered, General Nott ventured nobly for British glory, and advancing boldly on the one side, while his gallant compeer, Pollock, went forward on the other, he scattered all opposition before him, and accomplished an imperishable triumph. In the House of Lords, the greatest military authority alive, the Duke of Wellington, has pronounced his praise. Of Sir Robert Peel's speech in the Lower House I have already spoken. To such renown our acclamations would add nothing, but still we should have been glad to have given to the hero of Candahar a hearty cheer, to have shown him that what he did in Afghanistan is honoured here in Africa, to assure him that wherever his name is mentioned it is received with admiration, as identified with those noble troops whom he so nobly led to victory. Sir, General Nott is only a sample of those visitors belonging to the Military Service of India of whom there are several worthy representatives now present, who will always be as ready as he was to support the character of the service. And when, passing from the Military, I turn to the Indian Civil Service, I am reminded of the greatest political phenomenon in the universe. A joint stock company, with a capital originally of £30,000, has grown up into a vast empire, extending over regions presenting every variety of climate and productions, and peopled with uncounted millions. I speak not, indeed, of mere territory or continued conquests. These are things that have been often secured by brute force, and have been attended by nothing save human misery. But who does not know that the spread of British influence in India has been the spread of christianity, of civilization, of freedom, of good government? and that if India is to be saved at all it must be saved through British power? The moral influence of that British power depends mainly upon the manner in which it is exercised by the civil servants of the Company, and never did the character of the civil servants stand so high. All the old nonsense about nabobs has passed away, and it

is now admitted that in no quarter of the world are the affairs of Government managed with more intelligence or more integrity than in India ; that in no quarter of the world are there clearer heads to plan, and purer hands to execute, than amongst the gentlemen who would be an ornament of any service, and who are the glory of that most noble service, the Civil Service of India. And, if I might be allowed to point to an individual, I would say that the gentleman who spoke before me is a good specimen of the class to which he belongs ; that, holding high office, he exalts, by his character and talents, the office which he holds ; and that he is justly pointed to by all his brethren as one of the first men in India. And now, gentlemen, with that admiration for both the Military and the Civil Service of India which I have most inadequately testified, and conscious that I have been feebly urging what needs no advocacy, I am yet not sorry that I have had an opportunity of expressing the sentiments that you have been pleased to receive so well, and I now give you “ The Health of the Indian Visitors ! ”

IN PROPOSING THE HEALTH OF MR. JUSTICE KEKEWICH AT THE SAME DINNER.

[*Commercial Exchange, Cape Town, March 27, 1844.*]

The CHAIRMAN :—Mr. Porter, we are so delighted with you up here that we wish to have another toast from you.

Mr. PORTER :—Ready, Sir ! [A voice : “Ready, aye, ready.”] Gentlemen, you have received as it ought to be received the health of the Judges. I wish now to give you the health of one who was a Judge, who was an upright Judge—of one who will be long remembered in this Colony, and who will be respected as long as he is remembered—our venerable friend who sits right opposite,

Mr. Kekewich. You have heard that he has recently retired from the Bench, closing with honour an honourable career, and will soon take his departure from amongst us. It would be affectation to say that our venerable friend will, on the whole, regret his going. No doubt he will be glad to see old England's cliffs once more—

Breathes there the man with soul so dead,
Who never to himself hath said,
This is my own, my native land?

The soul of our old friend is not so dead. His feelings are as fresh as the first day,—he can kindle still,—the head of snow has nothing chilled the heart of fire. But he can never forget this Colony. It is associated with too many recollections. After spending some six and thirty years amongst us, it will be a solemn hour to him, and like that in which he left his native land, when the anchor is weighed in Table Bay, and he stands out into the deep. And when he reaches England, and finds places changed, and people changed, and the “old familiar faces” gone, then the thoughts of the old Colony, and the old circuits, and the old companions, will return upon him, as a still small voice to be heard even in the din of London—as a vision to be seen even amidst the fair and fertile scenery of his native Devonshire. He carries with him the kind feelings of the entire Colony. The Colony is not rich; pensions are not popular; complaining of every penny spent is a most comfortable thing; yet when his Gracious Queen saw fit to bestow upon our venerable friend a pension, not equal to his deserts, but greater than his modesty had led himself to expect, where was the man who said, “The old Judge has got too much?” Not one! He has the rare felicity of having no enemy. He takes home with him clean hands, a sound heart, an unsullied character, and the universal good will of the inhabitants. Let him enjoy his honourable repose. The wandering Sailor (he knows what I mean) has ploughed the main enough. And we are glad that he can now, with

“All his toils and dangers o’er,
Cast anchor by his native shore.”

Sir, I propose “The Health of Mr. Kekewich!”

ON THE DEEDS REGISTRY.

[*Legislative Council, June 22, 1844.*]

ATTORNEY-GENERAL :—I should wish to state that I have always thought that Divisional Registries in this Colony could not work well. The practice in England does not throw much light upon the practicability of such things ; for the only three registries in England, that of Yorkshire, that of Middlesex, and that of the unimportant place of Kingston upon-Hull, are restricted to lands lying within those districts, and are completely unconnected with each other and with the rest of the kingdom. With us a district registry would either be a most expensive thing, or a thing that would do more harm than good. If the register of each district should be furnished with a transcript from the Cape Town Registry of the contents of that registry, or of those contents even so far as the property of the particular district was concerned, the process would certainly be very costly. If, on the other hand, parties were left at liberty to enter in some book within the district such transactions as they should think fit, without any means existing there of verifying the correctness of the titles, no one could tell after a little time how matters stood ; and for one good registry you would have substituted many bad ones. Separate district registries, therefore, I regard as impracticable, except by means of a profuse and by no means judicious expenditure. The question regarding a separate registry for the Eastern Districts is not, of course, open to so many obvious objections. A registry there would only involve two registries for the Colony instead of one. It is true, indeed, that to furnish to Graham's Town books containing the information afforded by the books in Cape Town would cost as much as similar books for any one division. But considering the importance of the frontier, and its distance from Cape Town, the end in view, from its superior importance, might appear to justify the greater outlay. In fact, the measure is not one of principle but of

expense. To establish a registry for the Eastern Districts you should begin by transcribing from the records here the transactions affecting all the lands in those districts. Then you must have there a competent Registrar of Deeds, with a suitable establishment. And if the Cape Town Registry should still continue to embrace the Eastern Divisions, the cost of the office in Cape Town would not be reduced. Viewing the matter as one in which you must balance public convenience against public expense, I entertain grave doubts, as I believe most practical men on the frontier do, whether the necessary outlay would be justified by the good to be expected. It may, I think, be taken that a Registry for the Eastern Districts would entail an expense of some £1,200 or £1,500 a year, besides what may be called its outfit ; and the difference between the trouble, as at present, of sending papers down to agents in Cape Town and that of sending them, as would then be the case, to agents at Graham's Town, is not, I think, sufficiently onerous to warrant us, at least just now, in making any alteration. My hon. friend near me (Mr. Ebdon) has referred to a bill drawn by Mr. Harding, the object of which was to establish district registries. The bill was very well drawn, but I deemed it unnecessary to bring it before the Council, because, in fact, it did not so much establish district registries, as I understand the term, as provide for making the several Clerks of the Peace a sort of public agency for effecting registries in Cape Town ; and because, in general, it is better in these matters to leave the public completely to themselves. This was my substantial difficulty, and it did not appear to me that my friend, the Clerk of the Peace of Swellendam, had got over it.

ON THE DUTCH REFORMED CHURCH GRANTS IN AID.

[*Legislative Council, June 25, 1844*]

The ATTORNEY-GENERAL said:—Having been called on, Sir, by my hon. friend the Secretary to Government, in the course of his very luminous and satisfactory statement, to bear my testimony as to one important point in this case, and having been, I believe, the only member of your Executive Government who ever entertained any serious doubts about the expediency of this measure, it may not be improper that I should shortly state the reasons which enable me to give this measure, as it now stands, my cordial and unhesitating support. The principle of the measure is simply this, to retrench the public ecclesiastical expenditure in one direction, where it may, in our opinion, be advantageously retrenched, in order to increase the public ecclesiastical expenditure in another direction, where it may, in our opinion, be advantageously increased. I do not say, observe, that it will suffice to settle the question to show that you propose to give to the Dutch Reformed Church more money than you propose to take away ; for I can well conceive that you may be so placed with regard to that Church that to act upon such a principle would lead to much injustice. You may be so placed that no additional amount which you may be willing to grant can fairly justify you in touching the particular allowances now in question. But if it shall appear, upon a calm examination, that you are not fettered by any consideration of the sort alluded to, and are at liberty to act, in this instance, in whatever manner shall seem most conducive to the public good, then, I think, the question will come to be, not whether you may with a safe conscience carry this measure, but whether, with a safe conscience, you can incur the responsibility of rejecting it. Let us, then, attempt this calm examination. And in the first place, let us see

what the sound principle would be, supposing we were now, for the first time, settling the nature of the support which the general revenue should give to the Dutch Reformed Church ; in other words, let us see what sort of assistance Government should be willing to give, and the Church be desirous to get. Upon this point there seem to me to be some principles too plain to be mistaken or disputed. Sinking, for a moment, the former history of the Church as connected with Government, and keeping only in view the nature of the aid which should be afforded by the one, and received by the other, in an abstract point of view, I imagine we shall all agree in thinking that as no Church could have any claim to support from Government except as that Church is an instrument for preserving and propagating christianity and civilization among the people, so the aid given by Government should be devoted to the support of every Church considered as a great missionary institution, and to those portions of its system most clearly and directly calculated to carry out the sacred objects for the sake of which alone it is endowed. If this be so, how do we stand ? Had we now a clear stage, and were discussing the matter for the first time, could my hon. and learned friend (Mr. Cloete) satisfy Your Excellency or this Council, that according to the principles I have stated, we were as much called upon to give clerks to the congregations as to give ministers to the people ? I think not ; and that for two reasons. I think, first, that you should first pay ministers in preference to paying clerks, because the duties of the latter are of a subordinate description,—because those duties are confessedly not of essential importance in the performance of Divine service, and because, even if they were, they are of such a nature that any minister, worthy of the name, might, for the purpose of providing more ministers, kindle a spirit which might lead, if necessary, to their gratuitous discharge. This is one reason. And another reason is, because, although it is well to assist a scattered population, it is not well to do everything for any population ; and because to contribute to the inferior expenses of the Church is, according to general usage, a duty incumbent upon the worshippers themselves. In such a case, the happy middle course is for the general

revenue to provide the minister, that is, the missionary, and having done so, to leave it to the congregation to provide such other officers as may be requisite or seemly. By this means you secure sufficiently the main object for which, as I have before said, assistance should be given, and you secure at the same time a frugal and economical establishment of Church officers, by preventing every species of small ecclesiastical jobbery, as connected with the number and salaries of persons whom the people themselves are to pay out of their own pocket. And it appears to me that, since my hon. and learned friend (Mr. Cloete) is himself unable to see the propriety of our paying two clerks in one Church, or paying an organist in any, if he were to carry out the same sort of reasoning which has led him to this conclusion, he might in the same manner see, that for the purpose of keeping salaries in due subordination, and allowing the people to do something for themselves, the principle of paying Church clerks by the congregation is intrinsically the sound one. It does appear to me, that in the due co-operation of the Government and the people, the one paying the minister, the other paying the clerk, the most good is to be secured at the least cost ; and had we now no previous practice on the point, we should all, I think, concur in this opinion. Assuming, then, that upon general principle this system of paying Church clerks is bad, that it is a system which if the thing were to do again we would not establish, let us next inquire whether we stand in such position in regard to the Dutch Reformed Church that we may properly introduce a better system ? I have already admitted, and have no wish to withdraw the admission, that you may stand in such a position with respect to that Church that you could not introduce even an admitted improvement without doing wrong. But before I advert to the grounds on which I believe that you do not stand in such a position, I would repeat again what fell from the Secretary to Government, namely, that the objections sent in have not been sent in against this measure, but against another measure not before the Council ; and that this measure is justly obnoxious to very little of their force. All the respectable persons whose sentiments have been read were of

opinion, when putting those sentiments on paper, that the whole of the allowance heretofore granted to the officer called the clerk would, in accordance with Your Excellency's Minute, be everywhere withdrawn. With the modification which that project has since received, the gentlemen in question were necessarily unacquainted. In nine congregations, however, of the Dutch Reformed Church, from which £30 per annum was to have been taken, £18 per annum will still be retained by the clerk in his capacity as schoolmaster, the capacity in which that £18 per annum was first bestowed upon him ; and yet it is not proposed, on that account, to lessen the number of additional ministers as first proposed. And, Sir, if the votes of the ministers and consistories of the Dutch Reformed Church had been taken upon the measure as it now stands, I have very little doubt that some of the objections which have been urged would have been suspended ; that more of them would have been modified ; and that if but few ministers came forward to express their approbation, a good many would have refrained from opposing the plan, and allowed us to take their silence for consent. But coming at once to the objections as they stand, I observe that they range themselves under two classes. One of these classes puts forth, on the part of congregations, the plea of poverty. It alleges that, however subordinate to the services of the minister the services of the clerk may be supposed to be, yet that the assistance of such an officer is highly conducive to the decent performance of Divine worship ; and that the poverty of the people is such that to pay the clerk would be a serious burthen on them. Now, it is here that the difference between the old scheme and the new one becomes of such importance, for, although ecclesiastics are grave people, and sometimes announce even facetious things with gravity, I doubt whether any man could maintain his seriousness while he asserted that there is any one congregation in this Colony so very poor that it could not be called on to raise £12 per annum to pay its own clerk without creating a grievance—no, not even for the purpose of thereby ensuring four additional ministers to members of the same church living in districts far removed from all spiritual help. Few would, I think, have spoken merely for the £12 ; and although

at some places—Cape Town and Wynberg for instance—the reduction will be complete, we must not therefore conclude that even there the weight will be too heavy to be borne; seeing that at Beaufort, where there will be no allowance for a schoolmaster, and where the congregation will therefore lose the whole sum now allowed for the clerk, Mr. Fraser, and his two elders of whom he speaks, are disposed to make the necessary sacrifice in order to secure the greater good; and I should imagine that other congregations similarly situated are quite as able as that of Beaufort to act in the same manner. The Secretary to Government has shown, in my opinion, that we have not the slightest reason to suppose that there is a single congregation in the entire Colony in which the additional charge to be entailed by this measure—whether it be £30 per annum, as at Wynberg, or £12 per annum, as at most other places, or even a considerably larger sum than either, which will be the case in Cape Town—will work oppressively; for, in general, the numbers and worldly wealth of the people will be found to correspond to the increased amount required at their hands, and the paltry sum in question will be raised without being felt. Indeed the matter, considered merely in a pecuniary point of view, was, even as it was originally broached, so unimportant, that were it not for the natural and just jealousy with which any interference with the allowances of the Dutch Reformed Church will always be viewed—were it not for the greater suspicions which might be supposed to be entertained of the interference of what in substance will always be the Episcopalian Executive Government of this Colony—were it not that this most trifling measure might, by some, be regarded as the small end of a wedge, which, if once inserted, might hereafter be used to separate completely the Government and the Dutch Reformed Church—were it not that the ministers and members of that Church might see reason to apprehend that, although we now gild the pill which they are called upon to swallow, they may hereafter be called upon to swallow pills much bitterer and not gilt at all—were it not, I say, for such considerations as those at which I have now

glanced, I should scarcely have expected that anything in the shape of opposition would have been offered to this measure. And, having thus glanced at those considerations, I may remark that the measure is certainly free from favouritism, or, to speak more properly, that any apparent favouritism to be found in it exists in the case, not of the English, but of the Dutch Reformed Church. To the English Church you propose to give but a mere trifle more than you take. Not so with the Dutch Reformed. That Church will have bestowed upon it, over and above the amount retrenched, the services of a minister and more, somewhere, I should say, in money, about £250 per annum——

SECRETARY TO GOVERNMENT :—The amount will be £162.

ATTORNEY-GENERAL :—I am unwilling to pause upon a point of figures, but I imagine I am correct in my calculation. By the estimates as they are printed, the Church was to receive a bonus of above £90. To this we must now add the £18 per annum to be given to nine congregations.

SECRETARY TO GOVERNMENT :—Right. The true amount will be £253 odd.

ATTORNEY-GENERAL :—We shall say, for the sake of round numbers, £250 per annum ; a sum which is as fairly a donation to the Dutch Reformed Church as if it was wholly unaccompanied by any such arrangement as that with which it happens to be coupled. Circumstances have so settled it that the English Church obtains by the operation of the measure no similar gratuity ; a matter which is only mentioned to show that no sectarian feeling has had anything to do with the scheme before us. I come now to the second class of objections which I promised to discuss. Even admitting, it is said, that, in principle, the people should pay the Church clerks, admitting also that the people are not so poor as to prevent the application of that principle ; this measure is objectionable because it involves a breach of faith on the part of the Colonial Government. As this is a serious allegation,—as it is in some degree alluded to by, I believe, every opponent of the measure, and as the Proclamation of the 10th of November, 1843, is the instrument upon which it professes to be based,—it will be

proper that I should endeavour to clear up the meaning of that Proclamation and dispel the obscurity which seems to rest upon it. Let us begin at the beginning. How, I ask, did the Dutch Reformed Church stand in relation to the Colonial Government in the olden time? You may read the answer to this question in the Regulations of De Mist. According to those Regulations the Church was to receive certain payments. True, but by what sort of title? Was it by a legal title? by binding contract? by anything having the nature of law? Could any person belonging to the Church have maintained an action for his money? By no means. Not at all. Quite the reverse. When explaining the principles of the recent Church Ordinance in this Council, I showed that, under the Regulations of De Mist, every grant out of the public revenue to any Church in the Colony was to be matter of grace and not matter of right; that De Mist did not even contemplate that such grants should be continual, but intended them merely to assist the infancy of the settlement, declaring that, as soon as the people were able, they should be required to support the Churches from their own resources, of which ability Government must, of course, be the judge, and the existence of which ability Government might take for granted by simply withdrawing its support. Commissioner-General De Mist might have settled the matter otherwise if he had pleased it. He had a twofold character, one legislative and one executive. I regard that portion of his Church Regulations which relates to the payments and allowances to Church officers as being merely the announcement of an arrangement of the Executive Government, which, strictly speaking, the Executive Government might, at any moment, change. But it is quite unnecessary to debate this point, because, be the legal character of that portion of the Church Regulations what it may, this is undeniable, that by those Regulations no legal right was conferred upon any one; every allowance and payment was declared to be gratuitous; and the notion of a contract with the Church, or obligation on the part of Government, completely set aside. We come now to the Church Ordinance of 1843. In that Ordinance the principle of De Mist was again affirmed. It was affirmed by this Council unanimously, and

not without due proof being made of its propriety. I have not the Ordinance of 1843 before me, but it will be found that the second section of it explicitly declares that no religious denomination in this Colony shall be entitled, as matter of right, to claim anything whatever from the public revenue ; that everything granted shall be deemed to be perfectly gratuitous, and to be exclusively under the Queen's control, and revocable at Her Majesty's will and pleasure. Words cannot be clearer ; and, as I have said, the Ordinance passed unanimously. When it was passed we were afraid (I speak for the Government) that the motive for omitting from the Ordinance the enumeration of the allowances which Her Majesty would probably be pleased to continue to the Dutch Reformed Church might be misunderstood ; we were afraid that simple people in the country parts might take it into their heads that something novel was contemplated in the general plan of Church support ; that rural agitators, if there were any, might have it in their power to inflame the minds of the people by telling them that Government meant to throw their good old Dutch Reformed Church overboard altogether ; and, under those circumstances, I drew up the Proclamation of 10th November, 1843, which announced that, subject to the provisions of the Ordinance of the same year (that is, subject to the provisions of the second section as already explained) it was not intended to propose any change in the payments to be made ; and that there would be continued by the Government to the Dutch Reformed Church the aid, support, and countenance which it had hitherto enjoyed. What does this mean ? Let me try its meaning by putting to you the construction opposed to my own. It means, it is said, that there was thereby created something in the nature of an express or implied contract, placing every Church allowance, from the highest to the lowest, on an unchangeable foundation, and removing it for all time to come from all control, not merely of the Executive but of the Legislative power. This conclusion is startling. What, when De Mist's Regulations made grants revocable, when the Ordinance of the same date with the Proclamation made grants revocable, is a mere Proclamation to be held to make grants irrevocable ? This was

not and could not be the meaning. That meaning is very simple ; and what was done was fair, rational, and *bonâ fide*. To evince, as the truth was, that the Government, at that time, had no intention to alter any of the existing allowances, we said so, and stated that those allowances would be paid as usual. But under what condition ? Why, subject expressly to the provisions of the Ordinance to which I have so often had occasion to allude. And then came the declaration for the sake of which the Proclamation was principally issued, that the aid, support, and countenance of Government would still be given to the Church. Now to maintain that this amounted to an unalterable arrangement seems to me absurd ; for had an unalterable arrangement been intended at all, it would have been made in the Ordinance, and not in the Proclamation ; while not merely is it not made by the Ordinance, but a perfectly opposite arrangement is therein explicitly established ; and moreover, had the existing allowances been made permanent by the Ordinance, another Ordinance might have altered their nature and amount, while it seems now to be contended that this Council is wholly divested of any right to interfere. Let me remind the Council of another circumstance tending to show how completely all payments to Church officers were, when we passed the Ordinance of 1843, intended to be kept under the control of Government. In the scheduled regulations, as they came originally from the synod, some were introduced declaring that such an officer should receive so much from Government, and such another officer should receive so much more. We all agreed that such regulations should not stand. We all agreed that we could not delegate to an Ecclesiastical Council, meeting over the way, the appropriation of the public revenue ; and, therefore, all regulations purporting to regulate Government payments were struck out, and the views of Government relative to Church allowances, as those views were then entertained—but not so as to fetter its statutory freedom—were left to be declared by Proclamation. Sir, I am led to hope that in these remarks I have established these three points :—first, that, on general principle, clerks and sextons and such officers should be paid by the people and not by Government ;

secondly, that, altered as this measure has been, no plea of poverty on the part of the people can be set up to prevent the application of that general principle, considering the insignificance of the change involved ; and, thirdly, that the Proclamation of the 10th November, 1843, contains nothing calculated to withhold either the Government or this Council from making whatever arrangement may appear to them most salutary ; and that no breach of faith can, with any degree of fairness, be charged upon any party. I might here stop. But there is another ground which I cannot leave untouched. It is one in reference to which I chiefly hesitated. It arises from considering that this measure may be viewed as affecting, not two parties only—as most of the respectable gentlemen whose opinions we have heard seem to apprehend—but three parties, namely, the Government, the Church considered in its collective capacity, and the incumbents to be discarded. This measure has been chiefly regarded as a question between two of those parties : the Government and the Church. Now, as far as these two parties are concerned, I have, for the reasons given, no doubt or difficulty. Taken in its collective capacity, it is absurd to say that when you take but £709 12s. 4d. and give £963, leaving a balance of £253 7s. 8d. as a clear donation to the Church, in its collective capacity, that Church in that capacity has any reason to complain. But the third party I have spoken of has a right to be heard. I should be slow, indeed, to lose sight of the case of the incumbents. No expectation of greater good in another direction could reconcile me to interfere with the pittance of these poor men, some of them probably decayed members of the Church, who have seen better days—men fallen back in the world, and some, it may be, at that time of life which we ought not to darken with distress if we could help it, but which we should rather cheer with any little sunshine we have the power to create. And I certainly would pause long before I would counsel Your Excellency to disregard the representations of humble men who could, with justice, say, “ Though nominated by the consistory we were appointed by Government ; we are Government servants ; and we beg that we may not be reduced to distress even for the pur-

pose of appointing ministers elsewhere." But I feel myself relieved from all anxiety upon this point. I am relieved from it by the very nature of the arguments which are urged against this measure. I am satisfied that the measure will interfere with no man's bread. Why? Because, as we have been told over and over again, the officers in question, the Church clerks for example, cannot be done without, because, being myself a Presbyterian in principle, I know enough of Presbyterian usages to know that the clerk is a man not to be dispensed with, and that no congregation will ever dream of dispensing with him; and because, therefore, the question comes to be one entirely between the Government and the congregation, not a question as to whether the officer shall be paid, but merely a question as to who shall pay him. And, under these circumstances, it does appear to me that no congregation, considering the object to be attained, ought to hang back and refuse so very moderate a contribution towards advancing the general usefulness of the Church of which it is a member. Did the Government seek to make anything at the expense of the Church, the Church might well complain. But observe the liberality with which the Church is dealt with throughout. Endowments have long since been promised for three additional churches so soon as they shall be built. Therefore, lest any man should say, "Oh! the Government seeks out of this saving to fulfil its own previous engagements," the Secretary to Government has been directed to announce that the four additional ministers now contemplated are to be completely independent of the three other endowments alluded to, which will be made good the very moment the conditions are fulfilled. Irrespective altogether of this measure, those three ministers will be given; and it is for the purpose of going into fields of religious usefulness not contemplated by the Committee on Ecclesiastical Wants that four additional ministers under the Dutch Reformed Church are to be provided. It appears to me that with the explanations now given all opposition ought to be withdrawn. No man who knows anything of this Colony can deny that there are many districts in which the new ministers contemplated may be most usefully employed. Do not interpose between those ministers and those places. It is very easy for my

hon. and venerable friend (Mr. Breda) to say, "Oh ! with such a surplus you did so and so, and now, with such a greater surplus, you should do so much more," and, by stating a sum in the rule of three, demonstrate that you should give the additional ministers unconditionally. But to act upon this principle would ultimately absorb your whole surplus revenue, and would not be just if it were practicable, and would not be practicable if it were just. The sounder principle is, to retrench, if you justly can, and add what you can to your savings, and then bestow the whole in sending missionaries to carry the word of God into remote places,—places in which, considering the distance from all means of religious instruction, a distance which condemns men to perhaps only an annual attendance on public worship, it is wonderful that christianity should be preserved. I would, again, express my hope that the explanations made will be deemed satisfactory. I have meant to say nothing harsh of anyone ; and if I have said anything which at all appears to be so I am sorry for it. The clergymen whose views have been communicated are entitled, I think, to a candid construction of their conduct. We all know how they are situated ; placed at the head of a consistory whose opinions, whose prejudices, perhaps, they must necessarily respect ; and both clergymen and consistories placed amongst a people who certainly have, in the abstract, no fondness for taxation of any kind or to any extent. The views of all ministers circumstanced like those of the Dutch Reformed Church must, in matters of this kind, be made up, in some degree, of the views of their flocks ; and what powerfully impels me to call for this charitable construction of their conduct is, that some of the strongest remarks which fell from my hon. friend the Secretary to Government had reference to Swellendam. Now, all who know him will agree that the minister of Swellemdam is a man who is well worthy of his office, who is ever mindful of his deep responsibilities, who acts "as ever in his great taskmaster's eye," who leaves no human means untried to spread his message, and by whose exertions, aided by the liberality of his people, a missionary has been attached to his church at an expense, I think, of £60 per annum. If Dr. Robertson shall see reason for it he

will give no further opposition ; and other ministers will do the same. The opposition of the great majority of the ministers of the Dutch Reformed Church has been referred to, and not improperly. I respect such opposition, and will frankly confess that I should not willingly press anything relative to the Church, however good in my own eyes, against the clear and decided opposition of the clergy. They are men who have justly obtained great influence. They are, I believe, a great bond of connection between their numerous people and our Government ; and may now remove prejudices, and now explain errors, and now expose ill designs, in a way which no other men in this Colony can do, owing to the fact that the Dutch colonists have a warm feeling for their ministers, a feeling inherited from the pious people from whom they sprang ; while, on the other hand, if the ministers themselves become dissatisfied, “ if the salt have lost its savour,” these great benefits may be placed in jeopardy. These, Sir, are my sentiments. And as I have every reason to believe that there does not breathe any member of the Government one whit more hostile than myself to the reverend body of which I have been speaking, I will conclude by expressing my trust that this measure will be received in the spirit in which it is presented ; that it will be hailed as a boon by the large and respectable community whose best interest it is intended to promote by adding materially to its present means of usefulness, and enabling it to send more labourers into a field which it is the boast and blessing of the Dutch Reformed Church of this Colony that, under no small difficulties, it has already cultivated to so considerable an extent.

ON IMMIGRATION.

[*Legislative Council, June 26, 1844.*]

ATTORNEY-GENERAL :—I quite agree with my hon. friends that this is not a fitting time to enter on any discussion of the emigration

question. For my own part I shall not enter on it. I have mainly risen for another object, which will be very speedily despatched. My hon. and learned friend (Mr. Cloete) used some expressions about the length of time during which he and others were endeavouring in vain to stimulate the Executive in reference to the present subject, and as I am, I believe, the oldest member of that Executive, I deem it right to have one or two plain principles clearly understood. We certainly have had the subject of European labour under discussion more than once, and I have been called upon to talk my share in those debates. Having upon one or two occasions declared my sentiments at some length, and I hope with sufficient clearness, I venture to appeal to the recollection of the Council, and the record of our proceedings, to bear me out in stating that my sentiments (and so far as I know the sentiments of the whole Executive Government of the day were in unison with mine) were to this effect and no other. I said that as long as you had an uncanceled debt, which you were directed to redeem by surplus revenue, you could not divert, in opposition to the express reiterated orders of your masters, any portion of that surplus revenue to the purpose of emigration. I said that even were the debt cancelled, my opinion was, that of the two the Colony wanted roads more than immigrants, and that in any litigation between these rival undertakings I should rank myself as counsel for the roads, believing that to begin with immigration would be to begin at the wrong end. But I stated clearly and distinctly, and oftener than once, that when you had happily succeeded in clearing off your debt, and had made arrangements for improving the miserable internal communications of the Colony, I should be decidedly in favour of giving a moderate and well-considered system of European immigration a fair trial. And, Sir, I am glad to see that the time of trial has now come. For some years your exports generally, and especially your wools, have been increasing so considerably, and your import duties, partly owing to the natural effects of that increase and partly to the exertions of the very ill-paid officer at the head of the table, having run up from £40,000, which five years ago was deemed a high estimate, to upwards of £70,000 a year, below which we have no

reason to think that they are likely to decline, your finances have been steadily improving, and promise to improve still more. In the course of the last three years the paper debt has been gradually extinguished. Under the superintendence of the Central Board, combining the principle of local assessment with that of contribution from the general revenue, your roads are in progress of improvement, and the introduction of additional labour now, instead of preventing such improvement, would materially promote it. Under these circumstances, I should be inconsistent with all my previous declarations if I hesitated to agree with the proposal to try the effect of importing European labour. But while I was most favourable to a fair trial of the experiment, and while I was most anxious that the experiment should succeed, I distinctly declared that I did not think it either could or would succeed to the extent which more sanguine men anticipated. And upon this subject my impression is still unchanged. I said that the Boer, in general, would not like English labour, and could not pay for English labour. Here again my impression is still unchanged. I said that the natural, and I feared the inevitable, tendency of the imported labourers would be to settle in your larger towns, and forsake the country districts in which their labour is said to be most wanted. And here, again, my impression is still unchanged. But there is, notwithstanding, room. By bringing in well-conducted domestic servants you may liberate a sort of labour now kept in the towns, which will necessarily then seek the country; good artificers in moderate numbers are certain of employment; and even in regard to labourers of another description, more may be done than I can see reason to anticipate. The plan of my hon. friend, the Secretary to Government, appears to me to be a very good and wise one. On one or two points I made at first objections; but his reasons have satisfied me that he is quite right and that I was quite wrong. His bounty system, which I regarded as too complicated, I now perceive to be the most advantageous that could have been selected. By it you will assist those only who are disposed to assist themselves. You provide by it a master for the immigrant on his

arrival, and you let the immigrant know before he comes here what wages he may expect. When parties applying for bounty orders are obliged to state what they are prepared to give for a year's service, the real wants of the Colony will be discovered. By this means you can measure the demand for English labour which truly exists, and ascertain the rate of remuneration to be given for it. You can, by this means, feel, as it were, the public pulse. When any man offers a twelvemonth's employment with such and such wages for the husband, and such and such wages for the wife, and such and such provision for the children, no harm can come of providing a labourer and his family for that man. The evils of wholesale immigration will be altogether avoided. And without such a check I see not how this Colony should escape the consequences which have flowed from a less cautious system in other colonies. I hold in my hand a newspaper containing the recent report of the Committee of the Legislative Council of New South Wales upon the subject of the prevalent distress in Sydney, and I trust in God, Sir, that you may never have laid before you from this Council a document of a similar description. Why, it is probably no great exaggeration to say that a number of men, women, and children are at this moment starving in Sydney and its neighbourhood, which it must have cost £100,000 to introduce, and now the Colony would gladly, if it had the means, give another £100,000 to get them sent away again. The main reason for this unhappy state of things appears to be the recklessness with which immigrants were introduced upon the strength of great public works and the maxim that there could never be too many. But if we abide by the principle of ascertaining the public want before we bring in English labour, it is, in the nature of things, impossible that we can ever import it in excess. The operations of the Central Board will, of course, assist the working of the experiment; and, in my opinion, it may be carried into effect with the most perfect safety, regulated, as it is, by a principle which will necessarily restrain every tendency to get beyond due bounds.

ON THE L'AGULHAS LIGHT.

[*Legislative Council, June 26, 1844.*]

ATTORNEY-GENERAL :—I should not rise to follow my hon. and venerable friend, being entirely on the same side, but that it will, in my opinion, be creditable for us to pass an unanimous vote ; and because a little explanation may possibly have the effect of securing an unanimous vote. What my hon. friend has stated is, after all, a very strong argument—I mean the argument based upon common humanity ; for surely we ought not to be very nice to calculate mere profit and loss, or the equivalent, which the shipping of this Colony are likely to receive for the intended vote when we have before us the hope of preventing the recurrence of such harrowing calamities as those which my hon. friend has seen and spoken of. But upon these points I shall not enlarge. I had the honour of being in the chair at a public meeting in 1840, at a time when the public sympathy was stimulated by a recent shipwreck, attended by much loss of life, when I had an opportunity of saying what occurred to me as fitting ; and I think my hon. friend opposite (Mr. Ross), who was himself present, will agree with me that, considering the spirit which prevailed at that meeting, and the subscription by which it was followed up, a vote of £5,000 would not be unpopular amongst the humane and liberal men who came forward in so creditable a manner upon that occasion. Waiving, however, these considerations, it must never be forgotten that to vote £5,000 is not to vote a lighthouse. It may be that the public in general labour under a delusion respecting its nature and advantages. It may be that, as some say, a lighthouse at L'Agulhas would create more shipwrecks than it would prevent. Grant this ; yet, surely, as my hon. friend the Secretary to Government has explained, the mischief is not done by a mere vote of the money ; surely, we may safely leave the effects of a light to be determined

by the Elder Brethren of the Trinity House, without whose approval nothing will be undertaken. Surely if the work passes muster at Lloyd's, it may well pass muster here. The attention of Her Majesty's Government will be called to the point by His Excellency's despatch ; and as in London the best evidence that the world can produce in the shape of scientific men and practical men, and men who know the coast familiarly, is, at all times, obtainable, we may rest assured the question will be placed in the hands most competent to decide upon it properly. If we were about to begin a building at once, I could understand the objections of my hon. friend ; but when we are only showing what this Council will be prepared to do, in case the work shall be considered, by competent persons, one calculated to attain the end in view, then I submit that observations about leading people into danger, and so on, are altogether inapplicable. With reference to the fears which my hon. friend expressed, I can only say that I do not concur in entertaining them. His opinion upon this point must be a better one than mine, but we wholly disagree. It strikes me that a light at night must be most serviceable, considering the nature of the coast ; and that a lighthouse which would show at considerable distance would be useful even during the day to enable ships to sight it and correct their reckoning. I cannot but imagine that the strength of the currents in that neighbourhood is such as sometimes to puzzle the most careful mariners to tell accurately where they are ; and that some conspicuous object might materially assist, and could not well mislead them. These are my ideas. They may be most erroneous, as may the ideas of all the mercantile and nautical men who have subscribed to the fund, of the insurance companies in India who have also contributed, and of many other people who should know better ; but be that as it may, if we be ignorant, there are, in London, numbers who are skilled, and to them the question stands referred. If the work be one which ought to be erected, I see no mode of erecting it so feasible as that now proposed. Situated as the matter is, we shall not be able to raise much more by voluntary donations. The Mauritius, for instance, subscribed, as we were led to think, £2,000 ; but then came their commer-

cial embarrassments, and after that the prevalent report that the Trinity House would do the business from their own resources, and so from Mauritius we have never received a single farthing. I fear that the Home Government will not, without the co-operation of this Colony, take the work in hand ; but there is every reason to believe that they will be ready to assist you. Under these circumstances, the argument of the Secretary to Government seems conclusive. If you grant one-half the estimate, or nearly so, say £5,000, you will probably receive the remainder from Her Majesty's Government ; and you may, at all events, go with a good grace to ask for it. I trust that we shall act upon no penny-wise or pound-foolish principle in this case, nor be found debating how many ships are foreign and how many colonial ; but, now that we have got the means, taking the lead as we ought to do, though without begging the question one way or other relative to the utility of the project ; and only providing the necessary means in case it shall be found that a lighthouse at L'Agulhas will really tend to avert, in future, such losses of life and property as have already taken place at that fatal spot. Let us leave the question of expediency to the decision of the Home Government ; let us make a liberal grant conditional upon their approval of the measure ; and, above all, let us, in whatever we do, be, if possible, unanimous.

ON PRIVILEGES OF THE COUNCIL.—THE JUDGES.

[*Legislative Council, July 4, 1844.*]

The bill for enabling the Trust and Assurance Company to sue and be sued was returned by the Judges, who reported it free from legal impediment, adding "if duly passed and promulgated."

The ATTORNEY-GENERAL said :—It appears to me that may fitly take this opportunity of offering some remarks to Your Excellency

and the Council, with reference to the circumstances in which the bill just returned from the Judges is now placed. Though anxious to take the earliest possible opportunity of adverting to the important principle which I conceive to be involved, I yet admit that if the report of the learned Judges had pursued the common form of such reports, I could not legitimately have raised at present any discussion of difficulties of the existence of which we had received no notice. The report, however, is not in the common form. It contains matter which will not be found, I think, in any former report on record. Under these circumstances, I have a right to assume, not, indeed, that the Judges have in their own minds determined anything with reference to this Ordinance, but that they mean to put Your Excellency a little on your guard, by intimating that, in their opinion, there is, or may be shown to be, something questionable about the manner in which this Ordinance has been or may be dealt with which may affect its validity. I learned yesterday the nature of the difficulty which has been started ; and although I might, perhaps, guess at the ingenious quarter in which it originated, I shall not enter the judicial chamber, or speculate upon the extent to which the views of any one Judge may be the views of the rest, but shall assume for the sake of convenience that the three Judges are united in opinion, and shall throughout allude to them in their collective and judicial capacity. Bearing in mind, therefore, that the report upon this Ordinance does not bind any of the Judges to any sort of opinion—that, strictly speaking, it merely saves some point or other for future determination—and that, whatever the individual ideas of any member of the Bench may be upon the point, the Bench itself is committed to no judgment whatsoever—I shall state what I believe the point to be, and give my own humble opinion upon its merits. The history of the case is shortly this. In 1841 we passed an Ordinance which, for the sake of argument, I shall admit to be identical with the Ordinance now before us. Some changes have been made in the latter, but I shall concede that they have been too slight to affect the question of identity. The Ordinance of 1841, as the Secretary to Government stated the other day, was duly transmitted to London to be

submitted for Her Majesty's pleasure. It so happened that it lay over for a long time. But at length a despatch was received from Lord Stanley in answer to one from Sir George Napier, stating that the assent of the Queen would be found conveyed in a certain former despatch to which his Lordship referred. Consulting the despatch thus referred to, it was found that it conveyed the Royal Assent, not to the Trust and Assurance Company's Ordinance, but to the Board of Executor's Ordinance. This being the case, and a respectable proprietary being anxious for an Ordinance, the Executive Government were desirous, if they could, to assist them, and Your Excellency instructed the Secretary to Government to take officially my opinion upon the subject. I was of opinion, after considering the Royal Instructions, that Your Excellency might, under all the circumstances, properly propose or assent to a new Ordinance, to be framed even in the very same terms as the old; and, anticipating the point which has since arisen amongst the Judges, I gave some reasons for not deeming it inapplicable. The result was the introduction of the present Ordinance, the passing of it by this Council, and the report of the learned Judges, which I set out with noticing as peculiar. Sir, the point which has been made is this. By the 17th section of the Royal Instructions it is declared that any Ordinance of this Council repugnant to or inconsistent with those Instructions shall be null and void. The 28th section runs thus—"And it is our will and pleasure that you do not propose or assent to any Ordinance whatever to which our assent has once been refused, without express leave for that purpose first obtained from us." The 31st section provides for the transmission of Ordinances to England, and then states—"and if, on any occasion, our pleasure should not be signified to you upon any such Ordinance as aforesaid within three years next after the date thereof, then, and in every such case, it is our pleasure that from and after the expiration of such term of three years such Ordinance shall be deemed to be disallowed, and shall thenceforth cease to have any force or effect within our said settlement." Reversing the order of these sections, and applying them to the present case, it is argued that the Ordinance of 1841, not having

had Her Majesty's pleasure declared upon it for three years, has been by the 31st section disallowed ; that this disallowance is a refusal under the 28th section and that unless proof is given of express leave to introduce a new Ordinance it is repugnant to the Royal Instructions, and, by the 17th section, void. This is the argument which, for convenience, I have said that I would call the argument of the Judges. I do not, as I have already stated, understand all the Judges to have agreed upon the validity of this argument. Their report leaves it completely an open question whether, if published in the usual manner, this Ordinance, if brought into Court, would or would not, matters standing as they do, be declared void. They do not report that there would be any impediment to the working of a law framed in the terms of this Ordinance and duly passed. On the contrary, they state that there would be none. But they, or some of them, conceive that an impediment may arise to the due passing of this law,—that this law might not be duly passed by its mere promulgation by Your Excellency, and that the Colonial Courts might, notwithstanding such promulgation, legally declare it void, unless proof were made of express leave previously obtained. Sir, I do not agree in this construction. I am, as a lawyer, of opinion, of course with all deference to higher authorities, that this construction is an unsound construction ; and I think I shall be able to satisfy Your Excellency and the Council that it rests upon no good foundation. Its first assumption is a somewhat bold one. It assumes that the constructive disallowance of the 31st section, arising merely from the three years' lapse, is the very same thing as having once been refused—observe the words “once been refused”—as mentioned in section 28. Let us pause a moment upon this proposition and weigh it. It appears to me that an Ordinance might well be deemed to be disallowed under section 31 without being fairly in the predicament of having once been refused, within the true intent and meaning of section 28. I am not prepared to admit that a prohibition against assenting to an Ordinance which has once been refused, necessarily extends to an Ordinance which has been wholly overlooked for a term of three years, and which,

therefore, comes to be deemed as disallowed. Common sense, I think, calls on us to distinguish. The meaning of the prohibition in the 28th section is plainly this—"Do not set up your judgment against our judgment. When we have directed our mind to a proposed law, and have refused that law, do not, without leave, assent to the same law. Deem our mind to remain unchanged until you know the contrary, and do not, by returning refused Ordinances, one after another, force us to continue reiterating our rejection." Is this language applicable to the case of all Ordinances which have lain over for a space of three years? I think not. Why? Sir, a variety of cases might be put to show why. Suppose, by shipwreck on the water, or accident on land, an Ordinance to be lost on its way. Suppose that, when nothing is heard of it, the Colonial Government writes upon the subject and then learns that the Secretary of State has never seen it. Suppose that, in the meantime, the three years have gone by. Sir, we all agree that the Ordinance is to be deemed disallowed. True, Her Majesty never had it before her; true, she never had an opportunity of exercising her royal mind upon it; true, there may be every reason to think that she would not have refused it had she seen it; but still, I admit, it can operate no longer; it must be deemed to be disallowed. But am I therefore bound to admit that it is incompetent for the Colonial Government, without express leave, to introduce it again into the Legislative Council? I conceive not. I conceive that the meaning of the three years' clause does not carry me so far. It means to prevent Ordinances upon which no judgment of Her Majesty had ever been pronounced from becoming permanent by accident. But for this, or some similar provision, a law might be promulgated in the Colony, and, although one which Her Majesty might not have approved of, it would operate permanently in case it chanced to escape the Queen's notice. Therefore, in order to give but a short life to every Ordinance which has not been actually brought before Her Majesty and approved of by her, a provision is introduced confining its duration to three years, a rule which excludes all risk of unauthorized legislation, since, proceeding from three years to three years your successive Ordinances, the Queen must ultimately become well

aware of what you are about. To assert, therefore, that the actual refusal mentioned in one section, and the constructive disallowance mentioned in the other, are perfectly equivalent, and that by the prohibition the Governor is directed not to propose or assent to any Ordinance which, from even proved accident, has lain over for three years, in just the same manner as he is debarred from introducing or assenting to, without express leave, Ordinances that have once been refused, appears to me to be illogical. I consider that a construction which would absolutely prevent the Governor of this Colony from approving of any law which, though a good law, a necessary law, a law which Her Majesty would, no doubt, approve of, was nevertheless a law which, from accident or oversight, either here or in England, had gone astray for three years, would be a very inconvenient construction ; and I do not feel that I am driven to it by the Royal Instructions. But I will not rest here. I will go further. I will admit for the sake of argument, but only for the sake of argument, that the constructive disallowance to be inferred from the three years' lapse, is, to all intents and purposes, an actual refusal ; and I still deny that the learned Judges could, without a most unwarrantable assumption of authority, call upon Your Excellency and this Council for credentials, for proof of leave obtained, for any evidence, in short, of the propriety of what you are about. Let it be understood that I do not give up the distinction which I have already pointed out, and that I only waive it for the present in order to avoid dispute and get on with the discussion. And now, Sir, I respectfully maintain that the Judges, as Judges, do not and cannot know any one of the facts which, nevertheless, they must be taken to know in order to found the position which is attempted to be taken up. I separate altogether John Wylde and William Menzies and William Musgrave from the three Judges. The former may learn from your Excellency, or the Secretary to Government, or myself, any matter they think fit ; but the latter can know nothing of which they are not authorized to take judicial notice ; and I repeat that they cannot take judicial notice of any one of the facts essential to the support of the position in question ; and I therefore maintain that, under these circumstances, they are

called upon, as lawyers, to presume everything done by the Governor and this Council to be rightly done, and done in accordance with the provisions of the Royal Instructions. I shall take these essential facts one by one, and, first and foremost, I ask how the Judges knew that any Ordinance like the present passed in 1841? It may be answered, perhaps, because the *Government Gazette* in that year contained a draft of the Ordinance. Is that draft any evidence of the fate of that Ordinance? Certainly not; for, after being published, it may be withdrawn or negatived in Council; and it is to be recollected that the Ordinance in question never was promulgated. What next shall we say? Shall we say that all the proceedings of this Council are in contemplation of law open, and that the Court will take judicial notice of them? Sir, I deny it. From beginning to end of the Royal Instructions there is nothing to support any position of the kind; and all analogy is against it. This Council is not like a Court of justice, which, unless some express authority is given, should be construed to be an open Court. When, here, as in the House of Commons, it is competent for any single member, at any time, to move that strangers must withdraw,—is it possible to argue that our proceedings are to be considered public? Will it be contended that this Council could not, if it pleased, decide the whole fate of any given Ordinance with closed doors? If this is denied, I should like to hear the reasons upon which the negative is rested. You do not admit strangers during prayers; you do not admit strangers during the reading of the minutes; and in the same way, you need not admit strangers at any part of your proceedings. It may be, or it may not be, that we have occasionally John Wylde, or William Menzies, or William Musgrave present; but we have never any Judges listening. It may be, or it may not be, that we have Mr. Buchanan taking notes of what we say; but we have no reporter contemplated by our constitution. It is solely by courtesy, or sufferance, that any stranger remains in this room during our proceedings; and I protest against the doctrine that what is learned by mere courtesy and sufferance can be taken judicial notice of. Therefore, I ask again, how do

the Judges, as Judges, know that any Ordinance passed this Council in 1841? Could any individual Judge say—"Oh! I was in the Council-room on such a day, and I heard the Secretary to Government make a speech in which he stated that an Ordinance had passed in 1841, and his statement, as a public officer, is proof of the fact." What, when it is remembered, in addition to what I have already urged, that the Judge's presence was but an accident, that the Secretary's speaking at all was but an accident, and that the Secretary might, by an accident, have been wholly mistaken in what he said, and was not called on to say anything, is it possible to rest the point upon such proof as this? Again, therefore, I repeat, that the Judges, as Judges, cannot know that any Ordinance passed this Council in 1841. The public may read the draft in the *Government Gazette*; they may read in the *Cape Town Mail* that the draft passed into a law; but the Judges in their judicial capacity are wholly uninformed. But let me make another admission. Let me admit that the Judges might know, in some such way as has now been indicated, that the Ordinance passed this Council. What, then, was the next step? The next step was for the Council to submit it for the Governor's consideration—and how can the Judges know that His Excellency did not negative it? The Governor has, in his executive capacity, a negative, by which he can stop any bill, even after it has passed this Council, from becoming an Ordinance. Your sitting here, Sir, as President of this Council does not deprive you of your independent negative as Governor. The old practice so clearly recognized the separation of the functions that it required a deputation of members to be appointed to take up the bill to the Governor; and although the practice has fallen into disuse, the principle remains the same. I therefore ask, how can the Judges know that the Ordinance of 1841 was not quashed by the Governor's negative? To be sure the Secretary to Government might tell the first clerk that no veto had been exercised, and from the first clerk through the other clerks in regular descent the fact might become known, and it might then be caught up by the messenger, and ooze out through him to some other messenger, and so reach the Judge's chamber;

but where is there any legal, official, or authoritative channel through which the Judges, as Judges, can obtain a knowledge as to whether the Ordinance in question, which was never published, was negatived or not? It thus appears that the Judges cannot judicially know that the bill ever passed the Council; and that, even admitting that they could know that it had passed the Council, they cannot know its fate when laid before the Governor; and without assuming both these points there is, it is obvious, no room for any argument at all. We can easily suppose that, under the influence of the objections made by the then Attorney and Solicitor-Generals of England, Lord Campbell and Sir T. Wyldé, to the Board of Executors Ordinance, the Governor might have considered the Ordinance for the Trust and Assurance Company of 1841 objectionable, and have been led to negative it. But afterwards it is found that the objections to the Board of Executors Ordinance have been withdrawn by Sir Frederick Pollock and Sir William Follett, and that the Ordinance has received the Queen's sanction. Then the Governor, perceiving that the ordinance which he had negatived has ceased to be of an obnoxious nature, is pleased to order its re-introduction. In such a state of things the position which I am combatting would not apply the least in the world. And yet I defy any man to show that the Judges can know judicially that this very state of things did not exist in this very case. For these reasons, therefore, I, with but small pretensions to legal acumen, and pretensions perhaps as small to the rarer attribute of common sense, do yet venture to maintain that, in the case now before us, no ground is laid upon which any substantial argument can be rested, and that no ingenuity can cover its defects. I admit indeed, that there might have been judicial evidence of those essential facts which must now be assumed without any evidence, if they are assumed at all. The 32nd section of the Royal Instructions provides for the enrolment in the Supreme Court of every Ordinance passed by the Governor and the Legislative Council. Enrolment is judicial evidence of the fact that an Ordinance has passed. But it is undeniable that of the Trust Company's Ordinance in 1841 no enrolment has

been made. The Judges, therefore, ought to take it that no such Ordinance was passed. "Ah ! no," says some one, "not so ; we see the *Cape Town Mail*, we search the Colonial office, and we know that the Ordinance of 1841 did pass, and that the enrolment has been omitted through mistake." Suppose the fact to be that it was a mistake, can the Judges, as Judges, tell that ? Are they not bound to take it that the Ordinance was not enrolled because it did not pass ? Had the enrolment taken place, much of my reasoning would have been, I admit, inapplicable. I might fairly be told, "Mr. Attorney, you cannot contend that the Judges have no evidence that the Ordinance of 1841 passed the Council and was approved of by the Governor, because, by the enrolment, those facts are placed on record." But seeing that there is no such enrolment, the whole force of the argument is turned the other way ; for not merely are the Judges bound to consider everything done to have been rightly done, because they cannot take judicial notice of any of the evidence that an Ordinance passed in 1841, but because the evidence of that fact, by law provided, is wholly wanting. Sir, I may deceive myself, but these observations appear to me to bear strongly upon the point at issue. That point, let the Council keep in mind, is this, namely, whether the Judges can properly know that the Ordinance now upon the table is the same with an Ordinance once refused by the Queen. I have argued that a constructive disallowance is not equivalent to a refusal ; and if so, the whole point is at an end. I have argued that, even if the constructive disallowance were exactly equivalent to a refusal, the Judges cannot properly know that there has been even a constructive disallowance ; and, if so, the whole point is equally at an end. They do not know judicially what takes place in this Council, nor what takes place in the Colonial Office in regard to a bill, and they have no enrolment to rely on in the case now before us. But I go much farther. I have admitted a good deal already for the sake of argument. I will admit more. I will admit that, under the 32nd section, the Ordinance of 1841 had been enrolled as soon as it had passed ; and I will further admit that, under the provisions of the same section, a certificate of the Queen's refusal had-

also been enrolled ; and now, having made all these admissions—having give the adversary every advantage of position, and, with sun, and wind, and all against me—I once more deny that the Judges could have any legal right to say that the Ordinance on the table is not as good an Ordinance as this Council ever passed. I have admitted not a little that is not the fact. I have admitted that the Judges are to be taken to have judicial notice that the Ordinance of 1841 actually passed ; and that the Ordinance so passed was refused by the Queen ; and yet, I contend that they would be bound to presume all things to have been properly done, and that it would be going beyond their jurisdiction to declare the very same Ordinance, if afterwards introduced and promulgated by Your Excellency, not to be law. Why ? Because it is but fitting and decorous and due to the Governor of the Colony to presume that he would not, without the previous leave which his instructions require, have proposed and assented to the new Ordinance. Her Majesty has in effect, as I have already remarked, said to her representative, “ When I have once announced my decision, you, my Governor, must not set up your judgment against my judgment.” But this, I say, raises a question between the Queen and the Governor, and not a question between the Governor and the Queen’s Judges ; and I further say that it would involve anomalies, and lead to proceedings notseemly, if the Judges, in any case in which the Ordinance now on the table came into question in Court, should call for proof from Your Excellency that you had got a previous sanction. It appears to me that for the Judges to say, that the Ordinance, in case a previous sanction were proved, was law ; to say that in case no such previous sanction was proved, it was no law ; and then to call for evidence upon the point, would be wholly indefensible. I deny that it could ever be their duty so to do. I maintain that it would degrade the Queen’s representative, who should not be presumed to act contrary to his instructions, to call upon him to give any evidence to the Judges that he has obeyed those instructions ; more especially when there is not a tittle of evidence that he has not obeyed them. Take a case. Suppose the validity of this Ordinance to be questioned in Court. It is said to be no law, as it stands, but admitted that it may be shown to

be a good law. What next? Make proclamation in due form, "Governor of the Colony, come into Court; show us your leave; produce the despatch; put us into the Colonial Office; let us see all that has been done, and be satisfied that you have not transgressed your instructions." These, I say, are the consequence of the position taken up—[*Here some observation was made by Mr. Justice Menzies, in an under tone, which did not reach us. After a moment's pause, the speaker proceeded.*] Sir, if strangers are permitted to be present, I submit to Your Excellency that they ought not to be permitted to interfere with the freedom of discussion. While in the discharge of my public duty I am offering my sentiments upon this important subject, am I to hear it said by any man, I care not who he is, or what his rank, "That's a lie?" [Mr. Justice Menzies: "No, no."] Then my ears deceived me, and I am glad to be set right. I certainly was under the impression that I heard the words. I have now, however, no doubt that it was a mistake, and as the word "lie" is withdrawn—[Mr. Justice Menzies: "It was not used at all."] I am happy to have been mistaken. What was used was something very like it. No one is more liable than myself to grow warm in argument, but I conceive that as I was only testing by what seemed to me fair reasoning [Mr. Justice Menzies left his seat, and spoke to a gentleman sitting behind the speaker.] From what has just been said behind me I find that the words were, "That I deny." I have no doubt that they were so, and I am truly sorry that they struck my ear as different. I spoke from my understanding of the language. Returning to the argument, I would observe that I was submitting to Your Excellency that it would lead to the most unseemly consequences if the Governor, in such a case as the present, could be called on by the Court to prove that he had received previous permission to introduce the Ordinance. It is denied that such a consequence would follow. If not, I know but one way of avoiding it, and that would be by the Judges consenting to take the Governor's certificate that he had received the appointed sanction. Now I assert with much respect, but with some confidence, that this would be to give up the whole ground on which the objection rests. If the Judges say "We don't want the dispatch; we will take the

Governor's certificate as conclusive proof of permission granted ;" why not take the fact that the Governor has actually proposed and assented to the Ordinance as amounting to the same thing ? If the Governor obeys his instructions, and must be presumed to do so, a certificate would be useless. If the presumption be the other way, can the Judges allow the certificate of the very party who is suspected of acting wrong conclusively to cover his own acts from further scrutiny ? Would they not be called upon to say, " Governor, you are a man of high personal character, but, in contemplation of law, you are not to be believed ? you are a man of high talents, but, in contemplation of law, you may misconstrue documents. We must be satisfied that you, who are, by law, presumed to be capable of transgressing your instructions, do not fabricate a certificate to cover the transgression, or that the instruments which you construe to be a permission are really and truly such a permission as is necessary." But to say that the responsible Governor proposing the Ordinance is not sufficient to prove that it is proposed in conformity with his instructions, at least until the contrary shall be proved, and at the same time to admit the Governor's certificate of his own conformity as conclusive evidence, is not, in my humble judgment, sound or consistent reasoning. Perhaps it will be said that the Governor's certificate would fix the Governor's responsibility. Good. It would fix his responsibility. But is not that already fixed, I ask, by his proposing and assenting to the Ordinance ? It does, I confess, appear to me that the more this view of the case is examined the more clearly will it appear that if the Judges are authorized to demand any evidence of the Governor's receipt of the previous permission, they are called upon to insist upon the best evidence ; that the Governor's own certificate is not such evidence ; and that the Judges ought, therefore, to insist on seeing the actual authority* in order to be assured of its genuineness and sufficiency. Am I pressing the principle for which I am contending, namely, that of due deference on the part of the Judges to what Your Excellency and this Council enact, beyond due limits ? I think not. Do I mean to argue that every law which the Governor and Council pass is to be conclusively deemed by the Judges

to be a good law ? Clearly not. I do not seek to carry deference to that extent. The 17th section of the Royal Instructions, to which I have already adverted, expressly states that all Ordinances contrary to or inconsistent with its provisions shall be null and void. In the face of this declaration, I am not to argue that the question of repugnance can never come legitimately before the Court, which must determine whether or not any given Ordinance is null or not. But here I take an obvious, and, as I conceive, a just distinction. I distinguish between those directions which are given to the Governor touching the circumstances under which he should propose or pass certain Ordinances, in regard to all which the Judges should, in my opinion, without any inquiry, presume everything to have been fitly done, and the circumstances under which certain Ordinances, no matter how proposed or passed, are necessarily null and void. An instance of the second kind is furnished by the 22nd section in regard to lotteries. It is there declared that any Ordinance for establishing a public lottery shall be null and void. Now I agree that a lottery bill, though brought in by the Governor, passed by this Council, promulgated in the *Gazette*, and, perhaps, even approved of by the Queen, would be no law. Why ? Because there is a positive declaration avoiding the act ; because, therefore, there is no room left for any presumption that what is done is rightly done. The raising money by means of a public lottery is decisively declared to be an object which no Ordinance can, under any circumstances, accomplish. But in regard to Your Excellency's conduct relative to the circumstances under which you are not to propose or assent to any given Ordinance until previous leave, or some other previous formality—the case is altogether different. In the one case, the Judges know that Your Excellency has disobeyed your instructions, while in the other case, they do not know this, and, therefore, they are bound not to presume this. The one case relates to an object for which no Ordinance can be passed, but the other only to the circumstances under which the Governor and Council are directed to pass Ordinances for objects not prohibited, and while the former requires the Judges to pronounce the

Ordinance invalid, the latter calls upon them to presume in favour of the measure, and not to require proof of authorization. When the Instructions say that until previous leave you should not propose a particular ordinance, it should be presumed, when you do propose that ordinance, that you have received the previous leave. When the Instructions pronounce positively every lottery null and void, there is, as I before said, no room for presuming anything, and the Ordinance falls dead. With Your Excellency's permission I shall try and test these principles a little, and for that purpose shall refer to some other provisions of the Royal Instructions. By the 11th section of the Royal Instructions, Your Excellency is authorized and required to preside in this Council except when you may be prevented by some "insuperable impediment." Suppose an Ordinance to be passed and promulgated while the Secretary to Government, as next senior member, was presiding, is it to be said that the Judges cannot tell whether this law has been duly passed or not, until they know that there was really an insuperable impediment which kept Your Excellency away? In the same manner in which it is argued that the Judges must be satisfied of conformity with the Instructions in the case of previous leave obtained to introduce, afresh, an Ordinance once refused, so it may just as well be argued that the Judges must be satisfied of conformity with the Instructions in the case in which a bill is passed in Your Excellency's absence. And how shall they be legally satisfied? By the Governor's certificate that there was an insuperable impediment? Surely not. This were to commit to the party whose acts the Judges are to watch, the power of protecting himself effectually. If the Judges are to enter upon such points at all, I maintain that they should do so thoroughly; that when Your Excellency does not attend, and Ordinances are passed in your absence, they should know whether it was business, or illness, or amusement, and of what sort, which detained you; in short, that they should know whether the impediment were truly insuperable or not; and in case they found the impediment not, in their opinion, insuperable, that they should then pronounce the Ordinance bad, as having got its being contrary to the provisions of the Royal Instructions.

Does this matter of insuperable impediment at all resemble the lottery clause to which I before referred? No, not in the least. The one is only a rule for the conduct of the Governor, but the other is an inflexible restriction upon the extent of the legislative authority. Look again, Sir, at the 15th section. It declares that "The Legislative Council shall not ever proceed to business until the minutes of the last preceding meeting are read and confirmed." This is a wise and proper prohibition. But should the Judges call for proof, that, in this case, the Royal Instructions have been complied with; or should they not presume that everything has been rightly done until the contrary be proved. Nay, suppose the minutes to have been in fact not read, and an Ordinance passed, ought the Judges to receive any evidence from any quarter to stultify, upon such a point, the proceedings of the Legislature? As at present advised, I say that, had I the honour to be a Judge, I would not receive such evidence. Now I say that it is as clear as any demonstration in Euclid the very same objection of non-conformity with the Royal Instructions exists when the rule not to pass any Ordinance until the minutes have been read has been neglected, as when the rule not to pass without leave any Ordinances which have once been refused has been neglected. Again, Sir, the 34th section of the Royal Instructions provides, amongst other matter of a similar nature, that subjects having no proper relation to each other shall not be put into the same Ordinance. Is it to be argued that the Judges could constitutionally say of any Ordinance passed and promulgated that it comprised subjects not properly related; that it was, therefore, contrary to the Royal Instructions, and that it was consequently void by the 17th section of those Instructions? Is not, I ask, this matter a matter between this Council and the Queen, a matter of which it was never meant that the Judges were to assume the determination? But more than this. By the 19th section of the Royal Instructions, Your Excellency is enjoined not to propose or assent to any Ordinance "whereby the Queen's revenue might be lessened or impaired without the Queen's previous sanction obtained." Look now, Sir, to the late Port Ordi-

nance. It proposed to lessen Her Majesty's revenue, and it was passed, and it went to the Judges, and it returned with the common letter reporting no impediment, and no further note or comment. Now, when the question is about the rendering to the Judges proof of previous sanction, I ask how, by common sense or common logic, a distinction is to be drawn between the case of Ordinances lessening revenue and the case of Ordinances once refused? Both sections deal equally with certain matter (the revenue matter being far the more important of these) which the Governor should not do without previous leave obtained; and now I ask again for a distinction between this Ordinance and the Port Ordinance. The Port Ordinance, however, was distinguished by the Judges, inasmuch as they did not then report specially, as they have done now. Do I argue that they were wrong in the case of the Port Bill? Sir, I argue the reverse. The Judges then said, "We cannot catechise the Governor on such a point; we treat his office with deference, and presume that what he does he has authority to do; if he has not he is responsible to his Royal Mistress for his acts. But this matter of previous leave is a matter between him and the Queen, and not a matter between him and us." This I understand. But I do not understand how it can be reconciled with what seems to be the principle of the difficulty which I have been considering. What was presumed in the one case might just as well be presumed in the other, and I defy human ingenuity to show that if they were right then they are not wrong now. Sir, I have thus submitted to you and to this Council my reasons for contending that the three years' lapse is not a refusal within the true intent and meaning of the Royal Instructions; that even if it were, the Judges cannot judicially take cognizance of the facts necessary to show the three years' lapse; and that, supposing these points to be otherwise, the previous permission to introduce this Ordinance should be presumed by the Judges, who could not without impropriety demand any sort of proof or such a fact. I am, for the reasons stated, clearly of opinion that no person founding upon this Ordinance when duly promulgated ought to be called upon to prove that the Queen's permission had been given. What the opinions of the Judges may

be, I do not, as I have already said, affect to know. All that the Judges have done in their collective capacity is to declare that this is a question open to argument. Some of the Judges may possibly have made up their minds in one way, and some, it may be, in another. Be that as it may, I can sincerely state that I should feel happy to argue the question before them; and being certain that I should, at all events, be heard with that patient and candid attention which is invariably extended to me, I think I should succeed. I might then, perhaps, state with clearness what I have now, in all probability, left obscure, and show that I am not pressing too far the privileges of the Governor of this Colony or of this Council. And, in concluding these observations, the only thing that I regret is that I should have so lamentably mistaken a casual expression which fell from the learned Judge now present, which as I caught it naturally provoked remark, and apologizing to Your Excellency and the Council for the length at which I have trespassed upon your time, I have but to express my hope that the nature of the subject will be held to furnish some excuse.

ON THE REGISTRY OF DEEDS.

[*Legislative Council, August 26, 1844.*]

In moving the second reading of the Bill for the better regulation of the Office of the Registrar of Deeds,—

The ATTORNEY-GENERAL said :—The principal object of this Ordinance was to prevent the charge connected with the Deeds Registry Office from being a burden on the public treasury. From the earliest establishment of the Colony the system of transfer of landed property, as derived from the former mother country, Holland, had differed from the mode adopted in the present mother country, England. For the purpose of transferring the *dominium* or right of property in land, it was required that it should be passed formerly before a Commission of the Court of Justice, and now before the Registrar of Deeds. It appeared that, owing to the great

increase of business, the tariff did not remunerate the Government ; and as it was obvious that whatever considerations might call for such a measure as the establishment of a Deeds Registry Office, it ought not to entail any outlay or expense on the part of the Government. This Ordinance proposed to introduce a new tariff in order to prevent Government from being out of pocket. Another object was to relieve the officers of this department from the duty of preparing transfer deeds by throwing open the right to duly qualified persons. As the Ordinance originally stood, there was a provision that after the 30th June, 1840, it should cease to be legal for the Registrar of Deeds to prepare any deeds whatever. From a good deal of conversation out of doors, he was under the impression that the public generally did not approve of that peremptory prohibition, but were rather of opinion that it should be still competent for persons requiring such deeds to pay the advanced tariff at the Government office or repair to other parties and make a private agreement with regard to the price of the work to be done. He was a convert to the opinion that it was unadvisable to fix a period beyond which the Registrar of Deeds should not prepare a deed. If the measure had the effect of rendering it more beneficial to employ private persons for drawing these deeds, then there was no occasion for a prohibition to employ the Registrar, as it would amount practically to such a prohibition. But if from considerations of expediency, or for the sake of obtaining greater certainty, persons perhaps coming from a distance should prefer going to the Registrar of Deeds, it appeared unnecessary to forbid that officer from giving them the desired facilities. There was another point in the first section of the draft that required to be amended. As it stood it took for granted that every advocate, attorney, and notary public would be qualified to perform this duty. There was, however, reason to doubt whether among the notaries there were not some persons whose incompetency would spoil an accurate system of registration, or give more trouble to the Registrar of Deeds to correct and refuse their bungling work than would suffice to make out the deeds in the first instance. He would therefore propose that the right should not be thrown open with regard to attorneys

and notaries generally without undergoing examination. As it would be absurd and derogatory to the profession to establish a board of advocates to examine advocates in such a matter, he would propose that every advocate should be authorized to prepare these deeds, but that all other persons should take out a separate authority or license, which should be published in the *Gazette*. The person desirous of obtaining the license applies to Your Excellency and is referred to the ATTORNEY-GENERAL, who, taking two advocates to assist him, examines the applicant. In the case of notaries, by a rule which had been departed from perhaps from forgetfulness, the examiners are entitled to £1 each for their trouble, and £3 for the license would cover that expense. But if it is thought that £10 would be the proper sum I have no objection.

MR. CLOETE :—I would now beg to ask the Attorney-General what is the precise meaning of the charge for examining the books of the Registrar, which is stated in the bill as one and sixpence for “each letter?”

ATTORNEY-GENERAL :—When we were in Committee on the Insolvent Law, it was strongly represented by my hon. friend opposite (Mr. Ross), that however apparently available were the means of getting information from the Deed's Office, there were practical difficulties in the way. For example, a party goes to the store of my hon. friend and orders a large quantity of goods, and my hon. friend, not feeling quite sure in the matter, is desirous to ascertain whether there are no preferent claims on the estate of the purchaser before he gives him his property. Now there was an impression that the Deed's Office was so populous and much frequented that it was hardly possible for Mr. Ross to go in and ask, how are Mr. So-and-so's debts? without Mr. So-and-so hearing of the kind curiosity which had been shown with regard to his affairs, and of course if he were a solvent man, he would not darken the doors of Mr. Ross's stores again. To obviate this inconvenience there will be a perfect alphabetical register formed which will show the folio of every debtor's account. This book will be open to public inspection, and any person paying the fee may call for the volume containing a certain name without its being possible for any one to know the particular object of his inquiry,

especially if he turn over three or four other folios before the one that he is in search of, so that if he have common prudence he may come away with his information, if he pleases, perfectly and completely his own. By this means it is conceived that it will be in the power of any trader in Cape Town to make himself acquainted with the state of the debt registry, and thus we shall get rid of the complaints so often heard with respect to preferent bonds, a system which must exist in some shape in every commercial country, and mercantile men will be relieved from the necessity of continually blaming, not the principle of law, but their own negligence.

BILL FOR FIXING THE PRECEDENCE OF THE LIEUTENANT-GOVERNOR OF THE EASTERN DISTRICTS.

[Legislative Council, September 11, 1844.]

THE ATTORNEY-GENERAL, in moving the second reading of the bill, observed that it had been introduced by the direction of Her Majesty's Government for the purpose of securing to the Lieutenant-Governor of the Eastern Districts that degree of precedence to which he was deemed to be entitled. It would be recollected that, in his despatch of the 4th of January, 1844, Lord Stanley, after explaining the reasons which had induced Her Majesty's Government to place the administration of Justice under the control of the Colonial Legislature, had used these words :—"I have not any immediate suggestion to make for the amendment of the existing Charter of Justice, except in one respect. I think it will be right that a law should be introduced securing to the Lieutenant-Governor of the Eastern Districts, within the limits of his command, the same precedence over the Judges, and all persons there, as would belong to a Lieutenant-Governor in the actual administration of the Government during the Governor's absence from the Colony

itself." To do what Lord Stanley thus directed was the object of the present bill. He (the Attorney-General) had heard that some persons considered an Ordinance to settle rank to be "much ado about nothing." Lord Stanley, however, did not think so. It had been stated to him (the Attorney-General) privately, that no such thing as legislation upon such a point had been ever heard of in the Mother Country. This was not so. Most degrees of precedence in England were regulated by statute. In Blackstone's Commentaries, vol. 1, p. 404, which he held in his hand, a table of precedence was given, and it would be seen that a good deal of that table was regulated by 31st Henry VIII., chap. 10, and 1st. W. & M., chap. 21 ; other parts resting on letters patent and ancient usage. No doubt the Crown could effect the object by its prerogative, and so said Mr. Justice Coleridge in his note to Blackstone's text, but the intention was to relieve the Crown of an invidious duty. Besides the Acts referred to by Blackstone, there were the 5th Anne, chap. 8, the Act of Union with Scotland, and 40th Geo. III., chap 67, the Act of Union with Ireland ; and both these Acts provided for the precedence of the Scotch and Irish Peers respectively. Therefore there was no inherent absurdity in settling rank by law ; and this was done, in regard to the Judges, by the 7th and 8th articles of the Charter of Justice. Rank given by a statute could only be affected by an instrument of equal force, and hence the propriety of the present law. The present law was the mode in which Her Majesty was pleased to give a rank to the Lieutenant-Governor, and of the propriety of his having that rank assigned there was, he believed, no doubt. He (the Attorney-General) had entertained some doubt as to whether the present bill should not have adverted to the Charter of Justice, so as to repeal any of its provisions which should be repugnant to or inconsistent with the present Ordinance ; and he did not even yet quite perceive that that would not have been the best course. He was anxious, however, not to allude in any way to the previous controversy about precedence ; and therefore was well content to pass the bill as it stood ; when, if any impediment were reported by the Judges, arising from the omission, the matter might be corrected.

1845.

ON THE TACIT HYPOTHECS OF GOVERNMENT.

[*Legislative Council, January 16th, 1845.*]

In moving the second reading of the Tacit Hypothecations Bill,

The ATTORNEY-GENERAL said :—I am glad to be able to avoid troubling Your Excellency and the Council at any length upon so dry a subject as the present. The history of the measure is shortly this. On my motion, now some years ago, a Committee of this Council was appointed for the purpose of reporting upon the law regarding tacit hypothecations, regarding general mortgages, and regarding the Insolvent Ordinance. After many sittings and much consideration, that Committee agreed upon a report, which was published, and which embraced the three several objects of inquiry. The Report of Committee respecting the Insolvent Ordinance has been acted upon, and the result is the present Insolvent Law. With regard to general mortgages few changes were recommended, and those were rather of an executive than a legislative nature. The system of tacit hypothecations still remains to be considered and the Ordinance now before the Council proposes to amend it. I need not enter into the nature of the colonial hypothecation. It is sufficient to say that it is, in substance, the English mortgage, and that the tacit hypothec is a lien or liability arising by mere operation of law as contra-distinguished from the conventional hypothec, which is created by agreement between parties. It means that in some cases certain favoured creditors shall, without agreement, have the same rights against the estates of their debtors that registered mortgagees would have enjoyed. The principle of the law is that some sorts of creditors require special protection, and

they are protected by being silently clothed, without any visible act, with the character of mortgagees. The commonest case of tacit hypothec is that of minors, who, wisely or otherwise, are deemed by the law of this Colony to be so deserving of protection, that they are considered by that law as being invested with the character of mortgagees upon the property of their guardians, for the security of the balance coming to them upon a settlement of accounts. Other cases in which the same principle was conceived to be proper have extended the law of tacit hypothec considerably. In the Committee to which I have referred, all these cases were canvassed, and we were of opinion that the law might be amended and the public interest advanced by abolishing entirely some tacit hypothecs which appeared to be unnecessary, and by greatly shortening the time within which the right of hypothec shall be claimable in the case of such hypothecs as we did not see reason to destroy. This Bill is mainly founded upon the report of the Committee, and where it will be found to differ from that report, it will, I hope, be found to differ for the better. Upon a matter on which I formerly entered very fully, and which was so fully discussed in the Committee, I shall not detain the Council, believing that, when the Bill is read in Committee, section by section, I shall then be better able to explain its provisions. One explanation, however, it will be proper to make, in order to account for an apparent omission. Amongst the recommendations of the Committee was one to the effect that the tacit hypothec of Government upon the property of the collectors or receivers of its revenues should be abolished as unnecessary. At present, when the accounts of any such officer are deficient, Government has a tacit hypothec for securing the deficiency. I am bound to say that I do not see the necessity of this privilege, and that it would in my opinion be desirable to secure the Government in another way. So far as I know the privilege was never called into exercise in this Colony, except in the case of the late Mr. Stoll, and so far as I have heard of that case I do not consider that Government under the circumstances was justly and equitably entitled to sweep the estate away from the other creditors. The impression upon my mind is that

more diligence might have been shown and more searching examinations of the public chest might have been and should have been made ; and, if so, it seems hard that the negligent creditor should ultimately prove to be the only creditor paid. I agreed with my brethren in Committee in thinking that Government may require and receive from its administrators ample but at the same time registered securities to cover all such amounts as it can be necessary to entrust to their keeping, and a provision upon the subject in conformity with the report would have been introduced into the present draft, but that Your Excellency is prohibited by your Instructions from proposing or assenting to any Ordinance calculated to prejudice or impair any prerogative of the Crown without consent from England first obtained. That the right in question is a portion of the Royal Prerogative cannot be doubted ; and therefore, though this measure is a private one, and introduced by me merely in my individual capacity as a member of this Council, I did not think it discreet to encumber it with provisions to which Your Excellency could not assent. But I drafted, at the time I drew this Ordinance, a separate Ordinance, embracing the tacit hypothecs of Government, with the view, if the present bill should be carried, to move a resolution to the effect that Your Excellency should be respectfully requested by this Council to forward both Ordinances to the Secretary of State, at the same time, desiring for the one the gracious allowance of the Queen, and for the other Her Majesty's permission to introduce and pass it. The whole matter might, of course, have been comprised in a single bill, in regard to which generally Her Majesty's previous permission might have been solicited. Such a course, however, would not have served to show so clearly to the Secretary of State the principles which this Council was prepared to act upon in reference to the law between party and party, a matter of some consequence in considering how the law should stand in reference to the rights of Government against the property of its servants. Pending the decision of Her Majesty upon the Ordinance to be thus submitted (should His Excellency be requested to submit it and see no objection so to do) the bill now before us need not be promulgated.

That question, however, is for Your Excellency and the Council. I have no sort either of interest or wish one way or another, but what I have said will show the Council that I have never thought of skulking from the recommendation made by the Committee of which I was chairman, and contained in a report drawn by myself.

ON THE SAME SUBJECT.

[*Legislative Council, April 7th, 1845.*]

TACIT HYPOTHECS OF GOVERNMENT.

The ATTORNEY-GENERAL said that he had given notice at the last meeting of Council of his intention to move some resolutions to-day relative to certain of the tacit hypothecs of Government. He had been induced to change his purpose, and would not submit the resolutions which he had drawn up. It therefore became necessary for him to state shortly how the matter stood, and how he stood in regard to it. A Committee of Council had been appointed on his motion, now some years ago, which had investigated the subject of tacit hypothecs, together with some other branches of the law. The nature of the tacit hypothec was easily understood. It meant a right of mortgage rising out of the privilege of particular debts created silently by operation of law, and independent of any registration. That such a system was calculated to disturb the fair relations of debtor and creditor, particularly in a place where, as in this Colony, conventional mortgages required legislation, needed no proof. He was himself favourable to a more extensive interference with the system than the public or the Council approved of, but large reforms in regard to the tacit hypothec of private persons were considered by the Committee, and recommended in their report. In Committee, where he (the Attorney-General) was chairman, his hon. and

learned friend (Mr. Cloete), who took great interest in the whole inquiry, referred strongly to the tacit hypothecs of Government relative to contractors and accountants ; and called upon him (the Attorney-General) to state whether, circumstanced as we are, he deemed them defensible, and after having considered the subject maturely, he felt bound to admit to his hon. and learned friend that he could not defend them. He could not see why Government might not, like any other corporation, require such security from contractors of a personal or registered description as would render the tacit hypothec quite needless ; and considering the small amounts which were for the most part in the hands of our public accountants, and the peculiar facilities for taking unobjectionable securities which were afforded by the registration system of this Colony, he deemed the tacit hypothec of Government upon the property of accountants a privilege to be exercised against *bonâ fide* purchasers without notice to be almost equally opposed to principle. Practice, however, was certainly the other way in ancient Rome, in modern England, in continental Europe, and in the United States of America. But he regarded the principle as a remnant of prerogative times when the revenue belonged to the Government in a different sense from that in which it belonged to it now, and did not believe that, were the question novel, it could for one moment be admitted. The Government had in its own hands the best means of checking its accountants, and if it were admitted that now and then defaulters would be found, he was of opinion that the public, which was a sort of great joint stock company, could better bear a loss than miserable individuals who must be ruined by the Crown's preference. It would be invidious to mention particular cases. But it was well known that in the only two or three cases in which the hypothec had been resorted to very great hardship had followed upon its exercise. It was his conviction that the principle of preferences bestowed by mere act of law on particular debts was not a sound one ; and he saw no reason for giving to the State, that is, the richest creditor, a right which he would not give even to the minor if he could help it. The resolutions which he had framed affirmed the inexpediency

of the hypothecs in question. But he had reason to think that from their nature difficulties were felt which would prevent them from being unanimously carried. Under these circumstances he would not propose them, but would beg His Excellency the Governor to allow him to submit a memorandum for transmission to the Secretary of State, in which he would state his views upon the subject. This memorandum His Excellency was good enough to say he would forward together with the Ordinance recently passed for the regulation of the tacit hypothecs of private persons. Should the Secretary of State see any cause to advise the Queen to allow the Ordinance which had been passed, and moreover, to authorize His Excellency to assent to such a one as should pursue the tenor of the draft which would accompany the memorandum, well and good. Should his Lordship see difficulties in the way of excepting this Colony from the general principle, and greater difficulties in the way of a general alteration, the Council would act accordingly. His own sense of the consistency, however, required him to announce that, in the event of Her Majesty's Government being unable to approve of such a change as that recommended by the Committee in regard to the tacit hypothecs of Government, he (the Attorney-General) who had always considered the report of the Committee as involving virtually one measure, though divided into two, in deference to that clause of the Royal Instructions which prohibited legislation upon prerogatives without previous sanction, would be prepared to move a resolution in Council requesting His Excellency the Governor to negative the late Ordinance. It was quite true that the two measures might be viewed as perfectly distinct, and it might be wise of the Council to view them in that light. But circumstanced as he was with regard to the subject, he must keep clear of the imputation of having smuggled through one bill upon the understanding that another was to follow, which other never came ; and he should therefore afford the Council an opportunity of pronouncing upon the question, whether private hypothecs should remain unchanged in case the hypothec of Government should be preserved upon the property of contractors and accountants.

ON THE STAMP BILL.

[*Legislative Council, January 27th, 1845.*]

THE ATTORNEY-GENERAL said it might now be taken for granted that the debate was not to be adjourned, and that anything which any member might have to state must now be stated. At so late an hour, and in an atmosphere which had probably suggested India to his hon. friend opposite, he would not protract longer than a few minutes the sitting of the Council. And first as to the charge of this measure having been unconstitutionally introduced, made by Mr. Ebdon, and defended by Mr. Cloete, it was curious that they grounded that charge on totally different principles—Mr. Ebdon alleging that it was unconstitutional to introduce that bill without first consulting this Council, and Mr. Cloete maintaining that it was unconstitutional to introduce it without the previous authority of the Queen. The positions were inconsistent, and neither of them sustainable, since the course of Government was in accordance with the constitution and forms of this Council. The hon. and learned gentlemen proceeded to say, that in most countries where transfer duties were levied they were classed under the same head with stamps. It was so in France and Holland. Considering what would be the case if our transfer and our stamp duties were to be provided for in one tariff, he was of opinion that the transfer duties were disproportionately heavy. If we were now first providing a revenue from those joint sources, would any one deny that 4 per cent. on transfers was oppressive to one class whilst so little was laid upon another? Circumstances had changed greatly within the last few years, and were we now to continue a taxation which should be equal according to the proportions settled by Lord Charles Somerset, when the state of the Colony did not allow of that extension of the principle of stamps, which, at the present day was both practicable and just. If the old tariff had been the same as the proposed one, and transfer duty 2 per cent., what would be

thought of a measure for cutting down stamps to Lord Charles Somerset's tariff in order to increase the transfer duty to 4 per cent? The hon. and learned gentleman, after contending for the justice of equalizing the pressure, proceeded to observe upon mis-statements out of doors. There was a hubbub about insurances. It was said marine risks were to be taxed higher than in England, but this was not so. In England they laid on the duty in proportion to the premium, and that showed, in some cases, a small duty. But no premiums in this Colony were under 30s. per cent., and most risks considerably higher, and no insurance could be made in this Colony which would not, if made in England, pay 150 per cent. more than it would pay here. Then as to fire policies. There was McCullock's Commercial Dictionary, open at the titles, and it would be seen that in the form given of a fire policy there was marked margin, "Premium £1 10s., Duty £3;" that is, the duty was 200 per cent. upon the premium paid. But it was cried out again that here was to be a stamp on the annual receipt for premium. True. But everyone knew that in England that duty on a fire policy was paid annually, and the conclusion from this was obvious. He would not, however, be seduced into lengthened details, and he would merely state his views respecting the principle of stamps. He was no admirer of any tax that could equitably be avoided; but he denied that stamps were in principle a bad tax. A vast deal had been talked and written about oppression, and vexation, and many other things besides. Had the authority of any one good writer been adduced to show that stamps were in principle an objectionable impost? His hon. friend, Mr. Ebdon, pointed to McCullock, but he would find no such dictum in McCullock, although in the article on Marine Insurance contributed by another hand the duty on that particular thing was deprecated. In a late work, however, by McCullock—his statistics of the British Empire—it would be found that he pronounced stamps, when imposed in moderation, to be a judicious mode of raising revenue. The origin of stamps had been quoted against them; but, very unhappily, Holland had offered a reward for the discovery of the best tax, and stamps had obtained it. England,

it was argued, was giving them up. He denied it. Stamps yielded a sixth of her whole revenue. Senseless seditionists had compared this Stamp Act to that of America, a measure for equalizing the pressure of taxation amongst the colonists themselves, to a measure for raising in the Colony a revenue for remittance to the mother country ! But still, when about to coax America to contribute to the British treasury, the British Minister began with a Stamp Act as the most popular and least objectionable measure to which he could resort, a plain proof that stamps were not in his opinion in their nature intolerably oppressive. Some said they would prefer an income tax to stamps. Ireland was Sir Robert Peel's difficulty, and rather than carry his income tax into that country he largely increased their stamp tariff, proving that he deemed a Stamp Act less severe than an income tax ; and also that it was in his view the most expedient tax which he could substitute.

ON THE JUDICIAL ESTABLISHMENTS COMMITTEE.

Legislative Council, April 7th, 1845.]

ATTORNEY-GENERAL :—There are two distinct considerations to be attended to—one the economical, having reference to retrenchment ; and the other the political, having reference to efficiency. These considerations, instead of naturally coinciding, have a tendency the other way, for, in general, the more economical your system is, the less efficient it will prove ; and upon the other hand the more efficient your system is, the more expensive it is likely to be found. In reference to expense may we not consider that the chief items are ascertained in the information now before us ? We know what the Supreme Court costs, and have all the salaries in black and white from that of the Chief Justice on the bench to that of the tipstaff in the box. And coming to the Circuit Courts

we know pretty accurately what each half yearly circuit costs. With this knowledge we are enabled to perceive that if you can safely and properly get rid of circuits you will thereby get rid of some £3,000 a year. This would be a considerable saving. But you can't abolish circuits without providing a substitute, and you must calculate what the cost of that substitute will be. Do we want two circuits per annum? If not, do we want one? No one can answer these questions till he knows in what manner it is proposed that the business now done in the Circuit Courts is still to be done when Circuit Courts have ceased. We are led then to see that if Circuit Courts are to be abolished they must be replaced by some inferior courts; and then the question will come round to be whether, after having examined the returns which show the number and the nature of the sentences now pronounced by circuit courts, and after having considered the extent of criminal jurisdiction which might be entrusted to local courts, you can come to the conclusion that it would be cheaper in regard to very serious cases to bring the criminals to the stationary Judge, or to send the Circuit Judge to the criminals. Begin then at the beginning, and see how much you can properly increase the jurisdiction of the Courts of the Resident Magistrates. Try next whether you can bring together any and what number of Resident Magistrates at various places once a quarter or so; and, if you can, determine what higher jurisdiction such a bench might be entrusted with; and then have what amount of cases would probably remain to be brought to the Judges, for the purpose of estimating the comparative cheapness of carrying the criminal to the Judge, or the Judge to the criminal. I throw out these hints in order that we may break ground and get to business, for it appears to me that if we do not proceed in some such way as I have indicated we may sit here looking at each other till doomsday.

SECRETARY TO GOVERNMENT :—I think there is another question to be considered of still greater importance than the expense; I mean efficiency in the administration of justice as tending to improve or prevent the deterioration of the morals of the people. From all I have seen and heard I am led to apprehend that the

means of obtaining justice are generally so remote that the inhabitants, especially of the country districts, are sometimes led to overlook or even to compound crimes which, for the good of society, ought not to be tolerated. Such persons will not go to the expense and loss of time which are at present necessary for bringing offenders to punishment, and there can be no doubt that the effect is very injurious to the minds of the people, because it gradually brings them to look upon crime with indifference. I think this is one feature of the present system which we should endeavour to change, and the question whether this may be most effectually accomplished by having more circuit courts, or by quarter sessions, or district sessions, or in any other mode that may be suggested, is of far greater importance than any mere question of economy. I would not mind seeing double the expense incurred if this object could be effected; but my impression is that the money now granted is not well spent—that you do not get an equivalent for it.

MR. EBDEN:—There appear to be only two modes to be pursued—either the Judges must visit these places, or there must be magisterial authorities on the spot accessible to parties who may feel themselves aggrieved. Looking at the minute I should say the first question is: Is it expedient or not to increase the number of magistrates?

ATTORNEY-GENERAL:—That is too abstract a way of putting it. There is, probably, no country on the face of the earth in which it would not be in one point of view expedient to increase the number of magistrates. The plentier the magistrates are the less the difficulty or inconvenience of protecting life and property. But we cannot afford to multiply magistrates indefinitely; and the number to be given must depend upon the comparison between what would be abstractly advantageous, and what amount of revenue we can fairly devote. To what degree is such a scattered population as ours necessarily obliged to endure the evils of a remote magistracy? This is a thing to be decided, and it must be decided by a balancing of principles. If your magistrates are so remote that many persons in their districts would rather lose a horse, or an ox, or a few sheep, than bring the thief to justice—seeing that the

owner would thereby lose more, in time and trouble, than the stolen property was worth—there is no doubt that evil consequences will result. One consequence will be the establishment of a system of very summary justice indeed. In practice this system is sometimes vindictive and sometimes remunerative. It is vindictive in some such way as this. The sheep is stolen, and the thief taken, tied with a reim, and brought to the baas. “You stole the sheep?” “Yes.” “Well, will you take twenty-five here, or be sent in to the tronk?” “I’ll take the twenty-five here rather than go to the tronk.” And so he is stretched accordingly, and takes the lashes, and that affair is ended. The remunerative way of arranging these things is by binding the thief to serve as a labourer for one, two, or three years, in proportion to the value of the animal stolen. Now it is very plain that a near magistrate would prevent such occurrences, partly because the distance would not furnish so strong a reason for compromising, but principally because the parties concerned would be afraid that their proceedings would inevitably become known and lead to trouble. I wish to be understood as having decided upon nothing, and as only throwing out suggestions to be weighed. But if it be clear that magistrates ought to be increased, and that they can only be increased by a saving somewhere, the question will be as to the mode in which the necessary saving is to be effected. At present we may fairly assume that, separated as our magistrates generally are, to bring two or three of them periodically together would lead to great inconvenience and expense; but to increase the number would be to diminish the distance, and so to lessen the difficulties in the way of stated meetings.

COLLECTOR OF CUSTOMS :—It might be considered whether you might not beneficially increase the power of justices of the peace. At present they seem but of little use, having but the power to commit.

MR. HK. CLOETE :—I agree that this would be desirable, and then these justices might assemble in sessions.

ATTORNEY-GENERAL :—There is much difficulty in employing justices of the peace in the way suggested. Their services are

gratuitous, and I have, myself, strong objections to the principle of employing, more than is absolutely necessary, unpaid functionaries for services of such a character. It is not in the nature of things that they should feel themselves responsible, and in such cases the slightest interference is resented as an affront. They are not the salaried servants of the public, and are not to be treated as if they were ; and, therefore, when fault is found they plead their unpaid labours, and exclaim,—

“ Go, tell your slaves how choleric you are,
And make your bondmen tremble !”

Mr. Hk. CLOETE :—I consider that, in general, the justices of the peace are just as well qualified for the task as the magistrates.

ATTORNEY-GENERAL :—My fear is that we cannot, generally speaking, expect to find sufficient interest taken by those gentlemen. If you say that the sessions shall consist of the resident magistrate and such of the justices of the peace of the district as choose to attend, I apprehend the effect will be that for the ordinary routine business of the bench you may find a difficulty in collecting members ; while, when certain particular cases are to come on, cases affecting A B or C D, a rush may be anticipated for the purpose of supporting foregone conclusions. It would be well, however, as our chairman suggests, to fix upon some specific points, to be illustrated by evidence, in order that we may be able to set them aside and get on. Just now I should conceive that the system of the clerks of the peace forms a very important subject of inquiry.

Mr. HENDRICK CLOETE :—Is it intended to have juries in the magistrates' courts ?

ATTORNEY-GENERAL :—The jury system, in my opinion, would not work there at all. The system must rather resemble the old heemraden. There was, I may observe, an able bill before the colonial legislature many years ago, drawn by Mr. Menzies, for increasing the jurisdiction of the single magistrates ; but, in some way or other, the measure dropped. The framer, I think, is of opinion that my predecessor did not like the bill as well as it deserved and that this contributed to its failure. There is a piece of infor-

mation which it might be useful to obtain—I mean a return showing how often each clerk of the peace has left the drostdy town on public business during the last three years, and the business on account of which he travelled. The importance of such information will be readily seen. We already know the number of cases which the clerks of the peace conduct in court, and assuming that the duties of the clerks of the peace out of court are of a trifling nature, some further considerations would present themselves. The manner in which, for the most part, criminal cases come forward in the country parts, is in some such way as this. Cattle are stolen, the spoor traced, and the supposed thief arrested. After report to the field-cornet, the owner, with his herdsman or such other witnesses as are deemed to be necessary, proceed to the seat of magistracy, bringing with them the alleged criminal. On arrival they repair, not to the magistrate, but to the clerk of the peace, to whom they tell their story. He hears it, inquires who saw this, and who can prove that; and having put his evidence into ship-shape, takes all parties to the magistrate, by whom a preparatory examination is commenced. The management of the inquiry is various, and depends on how the magistrate and the clerk of the peace stand towards each other, and upon which of them happens to be the most competent. In strictness, perhaps, the magistrate should hear the witnesses; the clerk of the peace should, in the first instance, question them; and the magistrate's clerk should act as interpreter when necessary, and also record what is said. But there is, I apprehend, no fixed rule in this respect, and sometimes one party and sometimes the other takes virtually the whole duty, according as the clerk of the peace may be stupid and the resident magistrate clever; or, *vice versa*, the clerk of the peace clever and the resident magistrate stupid—if it may be supposed that either functionary is ever stupid. Now, if it shall appear that the duties of clerks of the peace are confined to rehearsing the evidence to be given at the preparatory examination, and afterwards to conducting ostensibly the examination in court, it would rather seem that clerks of the peace cannot be of indispensable importance. There is nothing here that might not with ease be provided for. If, on

the contrary, it shall appear that, if clerks of the peace are abolished, some cases will probably be hushed up, and that other cases will break down for want of necessary evidence which there was no competent person to collect: if it shall appear that whenever the "sough" (as the Scotch phrase is) of any crime reaches the drostdy town the clerk of the peace is found (where Sir Charles Napier says all officers in Scinde should be) perpetually in the saddle and prepared to ride off to the proper quarter to inquire and collect evidence,—if such is the duty done or the duty which should be done by the clerks of the peace, as the opinion of some eminent persons I know is, then it will be proper to consider whether such clerks of the peace as act in this manner can properly be spared, and whether in regard to the others, we should not, instead of knocking off the office, knock off the officers who do not duly perform their proper duties, and place more active persons in their room and stead. My wish, then, is to know from the nature of the duties actually done by the clerks of the peace, whether a less expensive officer, who might be likely to be more active, could or could not be expected to possess the skill and knowledge necessary for collecting and bringing in to the magistrate all necessary evidence, and at the same time no more evidence than is necessary; because, if so, I conceive that the mere examination of the witnesses may be left to the magistrate himself or to his clerk, and that the clerk of the peace may be dispensed with if it be imagined that the examination of the witnesses by the magistrate himself might tend to lead that functionary beyond the bounds of absolute impartiality by enlisting some feeling in favour of the prosecution in which he found himself engaged. It has been suggested to me by the Civil Commissioner of the Cape, that the clerk of the civil commissioner might conduct the case in court; a course which would keep the magistrate clear of all risk of becoming unduly interested, and which would provide a better prosecutor than the magistrate's clerk, who could scarcely ask questions, and at the same time preserve an accurate and unsuspected record. This is matter of detail, and may hereafter be considered. The main question is as to the extent to which clerks of the peace, in general, assist the administration of

justice. In Cape Town and Graham's Town such officers may be more required than in less populous places, and these towns may merit a separate consideration. But, in regard to the colony generally, the matter to be determined is whether the present clerks of the peace might not serve the public more effectually, if, instead of swelling the establishment at each magistrate's station, they were themselves stationed as resident magistrates elsewhere.

ON POETRY.—ANNUAL ADDRESS AT THE S.A. PUBLIC LIBRARY, APRIL 30.

[*Cape Town Mail*, May 3rd, 1845.]

The Hon. W. PORTER was called to the chair, and delivered the following address :—

LADIES AND GENTLEMEN.—At the call of the Committee I have consented to take the chair to-day. I am assured that those who have done me the honour to prefer the request were too well aware of the other engagements which demand my attention just now to have required my services if circumstances, at this moment, had not limited very much their power of choice ; and when led to think that my compliance with their desire might remove a difficulty, to have refused would have been either affectation or something worse. For this reason I did not feel at liberty to refuse. Were nothing expected from your chairman but to express his sense of the compliment conferred upon him, to announce his intention to be perfectly impartial and give every speaker a fair hearing, to claim the indulgence of the meeting, and call for its support ; and then, having declared his readiness to hear what any gentlemen may have to offer, to sit down and rest in peace, the duties would not be very arduous, nor would the preparation for discharging them demand any very great expenditure of time and labour. But I cannot forget that more than this is expected. The mere business of

this annual meeting is, in general, a bagatelle. Our treasurer is reputed honest, and lest he should be a cheat, our auditors watch him. The accounts, the complimentary resolutions, the list of books—all carry with them the character of routine. Every one feels that, in such matters, however necessary, there is no real interest whatever. Still, our annual meetings have not been without interest. That interest has been secured by doing something more than transacting our mere business. It has been deemed not out of place to address to the friends and supporters of a literary institution, as they were from time to time assembled, such remarks upon literature in general, or some particular branch of it, as the chairman for the time being might feel prompted to throw out. The results have, heretofore, been happy. Upon the occasion of our two last anniversaries the most comprehensive intellect perhaps in our community illustrated the contrasted spirit of Ancient and of Modern Literature with a splendour and effect to be anticipated from every exhibition of a mind in which round any one branch of human knowledge the richest particles of all other knowledge seem electrically to collect and crystallize. I propose to day to adhere to the plan of attempting something in the way of a literary discussion or discourse. In a matter which I have little leisure to mature, and which is very far removed from the sphere of my ordinary pursuits, I shall probably not succeed. But I deem the plan itself so good a one that rather than give it up I am content to fail. In looking lately over the advertising columns of the *Times*, I saw the announcement of "*Imagination and Fancy*," a selection of poetic passages from various authors made by Mr. Leigh Hunt, to which, the paper stated, was prefixed an essay by the compiler in answer to the question: "What is poetry?" It struck me that the question thus proposed was one not unworthy to be thought about, and when I found myself necessitated to appear on this occasion in this place, I determined to think about it at once and lay my thoughts before you as the subject-matter of this address. And as the nature of the subject seems to require more precision of thought and language than I could hope to command extemporaneously, I have put my views in writing, and in what more I have to say shall avail myself of the paper

which I hold in my hand. What is poetry? Is it a simple idea; and, as such, incapable of definition? If it admits of analysis, of what elements is it composed? What has it in regard to its sentiments, in common with Eloquence?—and in regard to its sound, in common with Music?—and what, nevertheless, are the essential differences in character between the three sweet sisters? Has poetry a Logic, as Samuel Taylor Coleridge somewhere has been pleased to say it has? Or does the answer to the question: “What is poetry?” depend, after all, upon the fashion of the day and the Quarterly Reviewers? These are, all of them, questions more easily asked than answered; and are questions which I do not hope satisfactorily to resolve. I trust, nevertheless, to be able to make the discussion of some of them, however imperfect, not altogether uninteresting. Let me first state, that, for my own part, I cannot consider such a discussion frivolous. It is true that what is called the spirit of the age is wholly unpoetic. It is true that the physical sciences attract in a great degree the general attention, and that the public taste seems to gravitate almost exclusively towards matter. It is true that while rhymers never were more plenty, poets never were so scarce. Look up into the literary sky, and you see but one great orb of song—Wordsworth; and when that luminary sets all will be dark. But still poetry has been, and must ever be, “a great fact.” It is the noblest, the oldest, the most universal, and the most enduring of what in very feeble phrase we term the Fine Arts. The sculptor fashions a graven image, but all it shows is form. The right hand of the painter, with all its cunning, can exhibit only form and colour. It is the poet’s province to produce impressions deeper than any to be stamped by statue or by painting, though the one were the boldest Michael Angelo ever imagined, and the other the most exquisite that his illustrious pupil, Raffæle, ever made immortal. It is, perhaps, not very much under three thousand years since the great Homeric poems were first got by heart. It was many centuries afterwards before they were ever committed to writing, alone preserved during all that time by the oral traditions of a people whom they profoundly agitated and charmed. These poems were

already old before the oldest system of philosophy was born. Since they first appeared empires and philosophies have risen, and flourished, and decayed. During that lapse of time, civilisation has been won, and lost, and won again once more. Everything has been changed except man and nature ; but man and nature still endure ; and there endure, with them, the two old Poems which image both, read now by schoolboys, careless of the controversy about their authorship, with something of the interest which they stirred when they were first poured forth by rhapsodists at the banquets of forgotten kings. To endeavour to fix the principles of poetry cannot, then, in the presence of such phenomena, be justly deemed a frivolous discussion. Indeed it is more likely that such phenomena may give rise to a sentiment the very opposite to that of contempt. It may be said that phenomena of such interest must have been so thoroughly investigated that the true principles of poetry have, doubtless, long ago been settled. This may be so. But there has never happened to come my way what struck me as being an account of poetry that contained the truth, the whole truth, and nothing but the truth. I shall mention a few of the definitions of poetry which I have seen in order that their individual correctness and their consistency with each other may be judged of. A much larger number might doubtless be collected, but I am obliged to rely on memory and some hasty references. Johnson, in his life of Milton, says that "Poetry is the art of uniting pleasure with truth by calling imagination to the help of reason." This definition may suit well enough such poetry at "The Vanity of Human Wishes," or any other didactic composition made up of sound moral truths expressed in verse instead of prose. But, applied to the "Paradise Lost," or any other great creation, is is not merely defective, but, as it appears to me, wholly misconceived. Pope's well-known couplet is as follows :—

"True wit is nature to advantage dressed ;
What oft was thought, but ne'er so well expressed ;"

and by *true wit*, I am sorry to say, Pope appears from the context to mean poetry. Of this unworthy definition it is enough to state

that it degrades poetry to a thing of diction, and mistakes the outward for the inward—the body for the soul. Another definition, which I have somewhere seen quoted with approbation, declares that “Poetry is the art of expressing our thoughts by fiction.” This accurately defines allegory ; but allegory is not, simply as such, poetical, and by separating our thoughts from the fiction which we use for expressing them the definition becomes altogether inapplicable to poetry, in which we may indifferently call the thought the fiction, and the fiction the thought—the things being inseparable. The able and amiable James Montgomery, in his lectures on poetry, discreetly declines to give any definition. “The nature,” he says, “or rather the essence of poetry, I cannot define, and therefore shall not attempt it.” The greatest female genius that the world has probably ever seen has touched upon the subject with her usual eloquence. “It is easy,” says Madame De Stael, “to declare what is not poetry ; but if we wish to understand what poetry is we must call to our aid the impressions which are excited by a beautiful country, by harmonious music, by the sight of a beloved object, and more than all by a religious sense of the Divine Presence.” There is much meaning here, but the thing described is not, objectively, the cause which produces the effect ; nor, subjectively, the mode in which the effect is produced, but simply the nature and character of the produced effect. Antiquity has given us a definition. Poetry, says Aristotle, is “*an imitative art*.” This is true, but it is not the whole truth, and, besides, other arts, painting, for example, and sculpture, might with even greater accuracy be defined in the same terms. A modern writer of distinguished talents has, in some measure, followed Aristotle. “By poetry,” says Mr. Macaulay, “we mean the art of employing words in such a manner as to produce an illusion on the imagination ; the art of doing by means of words what the painter does by means of colours.” But though much poetry is pictorial, all poetry is not so. Homer and Scott, in their inimitable battle pieces, show themselves great painters ; and it is wonderful how strongly Milton, in the two first books of *Paradise Lost*, making darkness visible, brings before our very eyes the fallen dominations

and all the horrors of their dread abode. On such occasions the poet is but a painter using words for colours. But there is poetry, and that of the most pathetic kind, which is not outward, or at least not wholly outward, which deals with abstractions and not images, which pursues trains of feeling too subtle and refined to take any visible appearance, and broods over "thoughts that do often lie too deep for tears." Poetry of this kind Mr. Macaulay's definition will not cover. Lord Jeffrey—need I say that I name this great critic with profound respect?—speaks thus of the noble art which I am now considering:—"The end of poetry, we take it, is to please; and the name, we think, is strictly applicable to every metrical composition from which we receive pleasure without any laborious exercise of the understanding." I dislike the intellectual epicureanism of this definition. Poetry, no doubt, pleases; but the sole end of poetry is not to please; and the poet who puts that end alone before him will never give true pleasure. Metrical composition is not poetry because it pleases, but it pleases because it is poetry. And why does Lord Jeffrey seem to consider that a certain soft luxuriance of soul is to be indulged by either the writer or the reader of poetry? If he had said that poetry is the product of another faculty than that which we commonly call the understanding, he would have laid down, I think, sound doctrine. But he does not do this. A certain exercise of the understanding it seems there may be, only it must not be laborious. Now it is true that when we speak of laborious exercise we mean exercise more or less painful; and therefore, since Lord Jeffrey's definition had already made the receiving of pleasure the end of poetry, the idea of everything laborious, that is, painful, was sufficiently excluded. But I object to the language in question, not merely as surplusage, but as surplusage involving a false notion. Taking the whole of Lord Jeffrey's definition together, I cannot but regard it as conveying a low and inadequate representation of the end of poetry, and as conveying no representation at all of the mode in which poetry attains its end. I shall not multiply these definitions. Those which I have adduced and questioned will serve to show the variety of views which have been entertained upon the subject. Various and discordant as they are, they cannot all be correct; but

they may all be incorrect to a greater or a less extent, and I have glanced at some grounds for thinking that they are so. Conflicting doctrines, in the meantime, are embraced by conflicting sects. You have the classic school, which objects to everything warm and florid, and talks about poetry being in its severity like a statue. You have the romantic school, which objects to a mere marble whiteness and chillness, and talks about poetry being, in its rich variety, like a painting. You have easygoing old gentlemen who regard Johnson's rules as laws of nature, and who are all for Pope. You have excitable young gentlemen who strenuously maintain that there is no poetry in Pope, and who are all for Byron. You have gentlemen of every age who deem Pope, with all his smoothness, terseness, wit and sense, to have had little profound, and, therefore, little poetic feeling; and Byron, with all his passion, power, depth, and eloquence, to have always written in a theatrical and exaggerated style, and to have never reaped that "harvest of a quiet eye," which makes the poetic wealth of William Wordsworth. Let these three high poetic names be named in any general society, and the result is an instant argument. And at last, when, if the disputants be not wearied, everybody else is, it begins to be perceived that we can never settle "Who are poets?" till we have first settled "What is poetry?" And how is an answer to this question to be sought? Not, certainly, by any *a priori* reasoning. The effect of poetry upon us is a fact in our mental constitution. In seeking for the cause of this effect it would be idle to apply any other principles than those which we apply to ascertain the cause of any other natural phenomena. We are conscious of a certain state of mind or feeling. We call that which produces that state of mind or feeling, poetry. What is to be done is to fix the particular state of mind or feeling which we agree to consider the perception of poetry, and to fix the particular quality or composition that produces the particular state of mind or feeling so perceived. For these purposes we cannot begin by laying down rules by which to try the facts. We must first examine the facts, and from them derive our rules. Poets existed before critics; and it was from an examination of poetry

made without any rules that the first rules of poetry were themselves deduced. By the same inductive process by which the astronomer ascertains the laws which regulate the motions of the heavenly bodies; by the same inductive process by which the chemist ascertains the laws which regulate the combinations and separations of the elementary particles of matter; by the same inductive process must the critic ascertain the laws which regulate the production and perception of poetic feeling. To conduct such a process is not easy. You cannot cast a poem into a crucible, and subject it to a complete analysis, as the chemist does a compound substance. Induction, in regard to mind, must, as has been well observed, be the subject of *observation* as contradistinguished from *experiment*. You are under the necessity of receiving the phenomena in whatever shape or way, simple or complex, they may chance to be presented to your observations; and cannot, at pleasure, change and multiply experiments. The result is that all sciences of observation are comparatively slow of growth (compare, for example, astronomy with chemistry), and, owing to the peculiar nature of the intellect, no other science of observation is so tardy in its progress, and after all so uncertain in its result, as the science of the human mind. Of this difficult science the principles of poetry and taste may be deemed to be a branch. But still where much is dark some things are clear. Every man, and every woman, and, I should think, every child, must be conscious of having been occupied by two distinct sorts or descriptions of states of mind. There are states of mind which are purely intellectual, and there are also emotions which are states of mind of quite a different kind. To perceive that two and two make four, that the three angles of any triangles are equal to two right angles that an argument adduced on any subject is a good one or a bad one, that the relation of cause and effect (whatever that is) subsists between certain phenomena,—these are instances of purely intellectual processes or states of mind. But these states are not all. To love, to hate, to fear, to be moved with indignation, to be melted with compassion, to be awed by the sublime and touched by the beautiful,—these are states of mind easily

and entirely distinguishable from the intellectual states referred to, and these are states of emotion. To one or other of these two classes, according to the greatest master of refined analysis who has ever applied himself to mental science (Doctor Thomas Brown), may all our trains of thought which have not a direct external origin be properly reduced. Now I take it to be obvious that, in considering the nature of poetry, we may get rid, at once and completely, of all the intellectual states. No purely intellectual state can be at all poetical. I comprehend a proposition stated to me, I draw an inference from a fact communicated to me, I remember circumstances that happened to me. Put such merely intellectual processes into whatever language you please, blank verse or rhyme, and you cannot change their essential character. Prose they are and prose they must remain. Facts compose knowledge, and methodized knowledge is science; and science, even if versified, set to music, and sung, could never claim to be regarded as at all poetical. Let me not be misunderstood. I have, I think, heard Dr. Adamson say on some public occasion, either here or at the College, that wonder (which is an emotion) was probably the first origin of physical inquiry. And there can be just as little doubt that to master old scientific truth, and much more to discover new scientific truth, is attended with a high degree of pleasure. But still while the wonder in the one case and the pleasure in the other are emotions, and as such capable of being represented by poetry, the physical facts themselves are wholly different, and never can be anything but prose. Archimedes rushing in triumph from the bath at Syracuse, shouting his renowned "*Eureka*," or Newton, when as figure after figure of his calculations made it more and more manifest that he had, indeed, at last discovered the true theory of the heavens, he found the agony of that great excitement more than he could bear, and was compelled to get a friend to bring out for him the last results, might perhaps afford a subject for poetry. But no muse on earth could sing with interest the principle of specific gravities, the discovery of Archimedes, or infuse into the principia of Newton the least poetic fire. Poetry, therefore, is conversant with emotion, and with emotion

only. This will probably not be disputed by any person who has ever read and relished one single deathless line. But everything that is conversant with emotion is certainly not poetry. Let me then distinguish, and at all hazards attempt to define. Whatever composition, then, recognised as imaginary and ideal, presents by means of words, artistically arranged in metre, images and sentiments naturally creative, either directly or by suggestion of emotion in readers, whose sensibilities are sound and active, is, in my opinion, poetry. And no composition which does not fulfil all these conditions can, in my opinion, claim the title. I shall attempt to make good what I have now said by adverting to these conditions separately.

I. It is essential, I think, to poetry that it be recognised as imaginary and ideal. Reality of course produces an effect and a greater effect than poetry, but the effect which it produces is a wholly different effect. Nay, in so far as poetry produces, as it often does, a temporary feeling of absolute reality, every feeling properly poetic is for the time swallowed up in a deeper feeling, and it is only the perpetually recurring consciousness that all is unreal, bringing with it a sudden sense of relief, a pleasurable perception of the writer's genius, and, perhaps, a complacent recollection of our own sensibility, that restores us to the state of mind in which the perception of poetic excellence consists. The perception of the real in the unreal is an essential attribute of poetry. Much has been written to show how it is that tragedy pleases. May it not be said upon the principle just referred to, that it pleases because by its representations it shows the real in what is still felt to be unreal ; because all excitement is pleasurable when not too intense, which it rarely can be when we never lastingly forget that what is viewed is but mimetic ; because no sooner does the illusion become complete enough to occasion pain, than the mind, made restless by its distress, turns from the scene upon itself, in which very act the spell of the illusion is broken, and there only remains behind a certain feeling of excitement, together with an admiring sense of artistic excellence proportionate to the excitement felt. In general the fear is not that we shall be too much moved,

but that we shall be moved too little, and therefore, the closer we can be carried to the confines of the actual the more do we admire the ideal. But still the ideal and the actual resemble those lines that mathematicians speak of, which, though they may approach each other indefinitely, yet can never meet. Did we at once absolutely and completely confound them and take fiction for fact, the barrier which divides what is prose interest from what is poetic interest would be instantly removed.

II. Poetry must work by words. By this as well as other peculiarities it is essentially distinguished from music, painting, and sculpture, which are all, however, more or less imitative arts productive of emotion. But for the absence of words as the appointed means of producing the designed effect, a definition of music might in a great degree apply to poetry. "Music," says Dr. Chalmers, in his *Bridgewater Treatise*, "apart from words, is powerfully fitted both to represent and awaken the mental processes, insomuch that without the aid of spoken characters many a story of deepest interest is most impressively told, many a noble and tender sentiment is most emphatically conveyed by it." This is a fine description of fine music. But still the language of music, though common to all men, is uncertain and obscure, nor can its cadences, however rich in touching or sublime associations, enable it to rival poetry, which can at all times give clear utterance to what music with its inarticulate sounds can go no further than suggest. That the condition of working by words instead of by colours or the chisel at once distinguishes poetry from the voiceless arts of painting and of sculpture, and opens for its exercise an immeasurably nobler field of operation, is too obvious to require proof.

III. Poetry must work by words artistically arranged in metre. This will, perhaps, be questioned. Poetry, it may be said, is in the thought, not in the language, and much less in any particular structure of the language. Rhyme is confessedly not essential to poetry. Great masters have not merely pronounced it not essential, but have regarded it as positively detrimental. Milton, in the preface to *Paradise Lost*, speaks to the effect that rhyme is a barbarous fetter, confining the free movement of the poet; an arbitrary yoke

which the free ancients never knew, and one which he thinks the moderns should contemptuously cast off. We may not be inclined to speak so disparagingly of a style of composition which, by causing the recurrence at regular intervals of the same sounds, makes poetry more musical, which adds to our enjoyment of the poem a pleasing sense of difficulty surmounted, and which, by the necessity under which it lays the poet of conforming himself to the measure in which he writes, tends to check redundancy of expression and to cut the meaning clearly out. But if rhyme, which is language arranged so as to secure the recurrence of the same sound, be not essential, why should metre, which is language arranged so as to secure by means of quantity and accent a certain measured march, be essential? Blank verse is metre; other verse is rhyme. If rhyme may be pronounced unessential, why not metre, since both may be said to be equally natural or equally artificial? There certainly are difficulties in the way in including metre as essential, but I am disposed to think that there are greater difficulties in the way of excluding metre as unnecessary. Poetry, it is plain, cannot exist in the thoughts alone in such a way as to be independent of all language. There may be a mass of vague and inarticulate emotions, the chaos out of which some fair creation is to spring, but so long as the elements remain without form and void there is no poetry. In building the lofty verse, words (as I have already intimated) are both the materials which the poet uses and the tools with which he works. But will any sort of words serve? This doctrine will not, I think, be held by anyone who reflects upon the mysterious union which subsists between our emotions and the language in which they spontaneously overflow; and how, when we are deeply moved, there arise, without effort or design on our part, words which are different from the words of calm and common life. Sir Walter Scott says somewhere that in the disputes of Highlanders the language often rose in character so much that it was common for one to say to the other "You have got to your English now," meaning to say, "Now you have got beyond your temper." Thoughts that breathe use naturally words that burn. There therefore is, and must be, a certain difference between the diction of poetry and the diction of prose, arising simply from the

fact that the things to be represented are different, and that language, by a sort of mannerism more easily felt than described, identifies itself with that which it is to represent. Now it is found that all strong emotion not merely uses words of a peculiar character, but that those words spontaneously arrange themselves into a measured form. We all know that to construct harmonious periods, even in prose composition of a moving character, is taught as art ; but it would not now be taught as art unless it had first been taught by nature. Hence by no arbitrary canon, as I conceive, but by a primitive law of thought and language, a certain harmonious arrangement, is found to attend the expression of feeling. "The long resounding march" is to be expected wherever there exists "the energy divine." Some sort of measure or metre, accordingly, is found to belong to everything that any people, savage or civilised, has viewed as poetry. Of Hebrew poetry, the oldest poetry, though the true pronunciation of the language is lost, enough remains to satisfy both eye and ear that the structure was regularly metrical, and, indeed, the noble version of it in our English Bible does justice to its music. We find the quality universal. Is it too much to conclude of a universal quality that it is essential ? If by the laws of thought and language it be not essential how comes it to be universal ? For my own part, though not insensible of the force of some opposite considerations, I regard metre or, at least, a certain rythmical arrangement, as one of the criteria of poetry, because the language of emotion naturally takes such a form ; because, historically speaking, all poetry has adopted it ; because by its artistic, or, if you will, its artificial character, it keeps us constantly in mind that the composition is, after all, ideal ; and because it is a clear and convenient, if not the only wall of separation, that can be raised between poetry proper and elevated prose. If in the latter there are occasionally presented thoughts which we call poetical we use in general a metaphor. There may be the raw material of poetry, but there is not the manufactured article. The ore, however precious, is still in the rough. Without metre it wants the image and superscription of Apollo. It may be very valuable, but it is not poetry.

IV. Once more, poetry, I have said, must be creative of emotion.

The creation of emotion is its great end. Images and sentiments, but chiefly the former, are the means by which it attains that end. Poets may communicate knowledge—Milton's learning was immense. Poets may exercise the logical powers—Dryden's reasoning in verse is much admired. Poets may give striking views of life and manners—Pope and Johnson have both done so. And, though difficult, it is not impossible to wed true poetry to themes in themselves prosaic. But the poets spoken of, in so far as they simply do such things as I have stated, might as well be special pleaders. I have seen what was called a poem upon conveyancing with a great deal about feoffments at common law and the statute of uses. Now all such things are beside the province of poetry, which, whenever it meddles with matters merely intellectual, and therefore prosaic, only does ill what prose would do well. The philosopher, the historian, the moralist, the scholar, have each lessons to communicate; and when the poet, as a teacher, undertakes to teach any of those lessons, he sinks his peculiar character and assumes another. Personifying as we do poetry as a female, one would say that science arrayed in a poetic dress is as awkward as a man in a woman's clothes. What Sir Hugh Evans, in the "Merry Wives of Windsor," says in reference to a similar disguise, applies very strongly. "I like not," says he, "when a woman has a great peard; I spy a great peard under her muffler."

To call up emotion, then, is the sole business of the poet. I use the term emotion in its widest sense. We commonly restrict its meaning to the strongest feelings. But in its philosophic acceptance it embraces every class of mental states, accompanied by pleasure or pain. When desire is very strong, or aversion very violent, we are accustomed to denominate the feelings passions. Such are fear, and pride, and hate, love, strong as death, and jealousy, cruel as the grave. But when I speak of emotions I include not merely passions such as these but the perception of the sublime or beautiful—whether in external nature, or in human action, or in human art—the sense of sympathy, hope, joy, affection, everything in short that warms and colours with any peculiar feeling the cold transparency of pure intelligence. Understanding the term

emotion in this its proper sense, I am strongly disposed to think that if emotion be not excited by any composition affecting to be poetry, that composition is not what it affects to be. But what? May there not be invention, and imagination, and fancy, in conception, metaphors and similies in language, and yet no emotion stirred? Certainly. Well, then, are not these things at all times poetry? In my opinion they are not. And as a brief consideration of this subject will enable me to make my general views more clear, I shall devote a few minutes to its examination. Invention, imagination, and fancy may, I think, be here treated as synonymous. We generally, indeed, use the term invention in regard to discoveries in science and the manual and mechanical arts; imagination to the faculty by which the form and character of fictitious creations are devised; and fancy to the beautiful but inferior quality by which the figures struck out by imagination are illustrated and adorned. I deem it unnecessary, however, to discriminate with any nicety between these different shades of meaning. But is it not clear that the degree in which the imaginative faculty exists is no measure of the degree in which the poetic faculty exists? Poetry is no doubt in a peculiar sense imaginative, but in philosophy and the useful arts there is imagination too. Milton knew, as matter of fact, that an eclipse of the sun was felt by all to be a sublime and most impressive object; everybody else, however, knew this just as well. But Milton had to convey a sublime and moving image of the great Apostate Spirit whose form had not yet lost all its original brightness. How was this to be done? Could Newton, who knew all about eclipses, have helped the bard had the bard needed help? No. But the inward eye of him whose outward sight was quenched saw that between Satan in his darkened glory and the sun in dim eclipse there existed, not an actual resemblance indeed, but that sort of analogy the perception of which is what chiefly constitutes imagination. And then all the other aids to emotion are called up; the disastrous twilight which is shed over half the nations; the fear of change with which monarchs are perplexed. This, we all feel, is high imagination. But about the time that Milton was

finishing the *Paradise Lost* another man chanced one day to be sitting under an apple-tree at Woolsthorpe, when an apple fell before him to the ground. That man was Newton. Could Milton, if at the spot, have discovered any significance in the simple fact that had taken place? No. But Newton saw, between the motion of the apple towards the centre of the earth, and the motion of the planets in their orbits, that sort of analogy which I have already spoken of, and thus became immortal. Now all feel that this again was an act of high imagination. Who shall say whether the imagination of the poet or that of the philosopher was, intrinsically, the higher? Who shall settle the precedency of these mighty intellectual potentates? It ought not to be attempted. "Newton was a great man," says Coleridge in his *Table Talk*; "but you must excuse me if I think that it would take many Newtons to make one Milton." But, in truth, their genius has not common qualities and cannot be compared. You might as well attempt to measure whether it is further from this to the first of June than from this to Stellenbosch. But it is clear that Milton's act of imagination was poetry, and that Newton's act was not. It would be easy to show by a large induction of instances that imagination or invention is exercised by able men in every pursuit. Such men see analogies which other men do not see; and that very perception constitutes invention or imagination. To discover new arguments in demonstration, new topics in rhetoric, new theories in science, new images in poetry—all are acts of the same generic character. Nay, to put the strongest case, an able lawyer must have imagination. The contests of the bar mostly consist in the opposing counsel taking up opposite legal principles, both generally sound; and thence, by the invention of intermediate arguments, seeking to show that the case in court is in analogy with one of these principles rather than the other. "There never yet," said the great Lord Hardwicke, was a good lawyer, who was not a good 'put-case' man." Now before cases are put they must first be invented; and to invent them is an intellectual act of the same kind, though far humbler in degree, with that which lit upon the law of gravitation. Imagination, therefore, as it appears to me, is

exercised, and exercised to a very large extent, in mental operations which are not poetical, and which no one dreams of calling such. Look, for instance, to prose fiction. A novel is certainly a work of imagination. But a novel is not therefore a poem. Nay, a romance, as such, cannot be called, and is not considered, poetry. The interest derived from incident, from delineation of character, from all description which purports to convey information, and the other matters that chiefly constitute romance, is not a poetic interest. And in so far as the Drama, or any other composition, in prose or verse, secures its ends by such means as those which I have now alluded to, I do not consider that it can be called poetry. Romances of the spectral, hand-and-dagger, trap-door school of Mrs. Radcliffe, do, no doubt, produce a great effect, if read at night in lonely places. Many melo-dramatic pieces may do the same thing. But there is no poetry here. The interest of such things is felt to be comparatively a vulgar interest. Why? Because they do not work with the words of pure emotion, marshalled in metrical array, and because the imagination which they exhibit does not involve the perception of those more subtle and refined, and, therefore, when true, more beautiful analogies which the poet's imagination detects and depicts. Look, again, at eloquence. Eloquence has been termed, and not unhappily, "the art of persuasion." As the end of reasoning is to convince the understanding, so the end of eloquence is to influence the will; but both, again, are distinct from poetry, which is not a means toward any ulterior end, but simply emotion kindled for emotion's sake. The orator presents arguments and motives; the poet presents neither, but only fine conceptions which have elevated or touched his own feelings, and which he knows will, by the sure law of sympathy, elevate or touch the feelings of his readers. A speech which should imitate the diction, the measure, the images, or the sentiments of poetry, would be infallibly a bad speech. If the speaker have poetry in him, he must bear it, as the flint does fire. When much enforced he may emit a hasty spark, but he must straight grow cold again, if he would succeed in real life, where the gorge of every reasonable being rises to see a man playing at poetry where there is work before him and

business to be done. Were I required to define true eloquence, I should venture to term it sound sense vehemently urged ; reason made red hot by passion. The orator may use figurative language ; but it must be sudden, direct, and, at least seemingly extemporaneous ; language that presents obvious resemblances, not language which suggests remote analogies. The metaphor in which there is a fusion into one of the image and the thing imaged is occasionally allowable ; though the simile is too slow and studied. But the metaphor, though the product of imagination, is not necessarily poetic. I should say that eloquence was distinguishable from poetry by the absence of a metrical arrangement in its language, by the nature of the object to which it is directed, and by the nature of the means by which it seeks to attain that object. I feel that some obscurity hangs over the terms in which I have ventured to distinguish between these two styles of composition, considered as mental operations ; and perhaps the difference is to be felt, not described, in the same way as we are often conscious of essential differences in character between two persons whom it would be difficult to avoid describing in the same way. The difference between oratorical and poetic power is proved pretty clearly by the fact that, from Demosthenes downwards, great orators have rarely versified at all, and still more rarely versified with any success.

It appears, then, I think, that the object of the poet is to raise emotion, and to raise it by a different machinery from any used by any other writer ; that he is not concerned with either historical or scientific truth ; that he neither reasons, nor compares, nor classifies, nor communicates knowledge, nor logically infers nor rhetorically persuades ; but by images and association, of the peculiar kind suggested by his peculiar genius, conveys to other bosoms the multitudinous and ever-varying emotions which animate his own. To have the perception of poetry without the experience of emotion I hold to be a contradiction in term. A vibratory action amongst the elements of emotion is in poetry the true theory of light.

But while I consider the excitement, in a certain way, of some

emotion of feeling as contradistinguished from every operation merely intellectual, as characterising everything justly entitled to the name of poetry, I do not regard everything else as out of place in a poem. Far from it. A poem may borrow facts from science ; plot from prose fiction ; eloquence from oratory ; and be all the better for so doing. These things, by varying the interest, tend to increase it ; and alternating as they do with the really poetic passages, serve to set them off to more advantage on the principle of light and shade. In themselves, however, they are not poetry, but something without which poetry could not, perhaps, be long enjoyed. The doctors tell us that food very much condensed over-stimulates the system and soon brings down our body's strength. It is therefore proper, they say, to mingle such food with other substances not in themselves nutritious. The same principle applies to the mind ; and hence the use of mingling, particularly in long poems, many things which in themselves are not poetry.

V. The last clause of the definition which I have given, requires that the emotion to be created should be created in readers whose sensibilities are sound and active. In vain is melody poured forth to people who have no ear for music. In vain is poetry poured forth to people whose sensibilities are deadened or depraved. But who shall judge whether sensibilities are sound or otherwise ? To answer this question would require time ; and therefore it cannot here be answered. It raises the old question about the standard of taste, and involves also a discussion of the nature of beauty. Referring, upon these subjects, to the many writers who have treated of them, I shall merely add that the force of traditional dogmas, the effect of accidental associations, the influence of habit, and the authority of names, have tended to throw so much into confusion the whole of the principles by which poetic excellence should be judged, that it becomes the more necessary to try and discover whether there are in truth any such principles, and if there be, to state their nature. It were well to fix foundations. To render this address at all complete, it would be necessary to adduce a number of examples, to

prove that in every line which the heart hails as poetry there is a communication of some emotion. By such an induction, if candid and complete, we might verify the hypothesis. If it stood the test, we might then, by a deductive process, so apply the law established, as to determine how much of what is misnamed poetry it would be necessary to rank no higher than prose in masquerade. But such a task, at any time beyond my strength, I could not now even attempt. It was my design to have concluded with some general remarks upon the influence of poetry on society in general, and upon poets themselves ; to have examined how far the former may be raised by it above low concerns and selfish cares ; to have traced how it comes to pass that the latter, in so many unhappy instances, had marred the god-given strength ; to have inquired incidentally whether there is any, and if so, what sort of connection between mind and morals, genius and goodness. In such a course it would have been my object to show that, upon the whole, poetry has done service ; and that while foolish people of both sexes, who have applied themselves to it, have remained as foolish as they were at first, it is made evident by many examples, that in poetical sensibility there is no practical unsoundness. But to do all this would exceed your patience. These, however, are not the times in which to fear excess of high poetic feeling. It is an age too late. Language, becoming philosophical, is ceasing to be picturesque ; and the imagination, which took the turn of poetry when the world was younger, now takes the turn of science. It may be that the change is for the better, though it is hard to think that England can never behold another Milton. And having named once more this mighty poet, I shall conclude with a passage from his prose works, in which, anticipating the noble labour of a later period, he shows the value which he placed upon poetic genius, and describes in a magnificent strain some of the uses to which it ought to be devoted. "These abilities, wheresoever they be found, are the inspired gift of God, rarely bestowed, but yet to some (though most abused) in every nation : and are of power, beside the office of a pulpit, to inbreed and cherish in a great people the seeds of virtue and public civility, to allay the perturbations of the mind, and set the affections in right

tune ; to celebrate in glorious and lofty hymns the throne and equipage of God's almightiness, and what He works, and what He suffers to be wrought with high providence in His church ; to sing victorious agonies of martyrs and saints, the deeds and triumphs of just and pious nations doing valiantly through faith against the enemies of Christ ; to deplore the general relapses of kingdoms and states from justice and God's true worship. Lastly, whatsoever in religion is holy and sublime, in virtue amiable or grave ; whatsoever hath passion or admiration in all the changes of that which is called fortune from without, or the wily subtleties and refluxes of man's thoughts from within ; all these things, with a solid and treatable smoothness, to point out and describe."

The Rev. BROWNLOW MAITLAND said :—In moving a vote of thanks to the late Committee, I shall not, Sir, attempt to make a set or literary speech, which would be presumptuous in me before others who are much better able to do so than myself, and especially in the overawing presence of these mighty volumes which encompass us, richly treasured with the intellectual fruit of ages. I should almost fancy that I saw some of the great philosophers and students and divines of older days, whose wisdom and learning are here stored up for our profit, glaring at me from the backs of their old tomes, and frowning down their condemnation, were I to do anything so unbecoming as to prate idly and dogmatically before them. Yet, as I am on my legs, and I suppose the Cape, like England, expects every man to do his duty, and contribute his mite, however humble, to the common stock, I will venture to say a few words on the subject foremost in our minds to-day—the value to us of this noble library. The possession of it must be felt to be a great privilege, and one in which we are singularly favoured in comparison with other colonies. But were I to indulge in a strong expression of feeling on the point, I might perhaps be cut short by some matter-of-fact person asking how it is possible for him, busied as he is in the active duties of life, "from morn to noon, from noon to dewy eve," ever to penetrate into these treasuries of knowledge, ever to get beyond their mere titles, or to find them more than vaunts of sealed-up wisdom, totally

inaccessible to him, since to read through these shelves would occupy hundred of years of incessant toil. And many, doubtless, on gazing on an extensive library like this, have felt a sensation of sinking and despair at the utter hopelessness of grappling with its contents. How much of the field of science must be left unexplored by almost all of us ! We have not all the tread of him whose powers, Sir, you have so justly eulogized ? We are not all Adamsons. Yet we must not despair because we can but grasp little ; that little let us gather—of the best quality and in the best way. And whoever aids us in overcoming the difficulties is our benefactor. I will therefore mention one way in which even the least-leisured man may make a good use of the library. In thinking, reading, conversing, observing, in fact, in every occupation and at every turn, multitudes of questions arise before us, in history, in physics, morals, philosophy, language, &c., which we are too ignorant to solve. Now in such a case, instead of letting the matter alone, and being content with ignorance, let the point be noted as one to be inquired of ; and in the first leisure half hour (and every man has, or ought to have such) come down to the library, and turn up the book which will resolve the question ; and then you have got a fresh and distinct item of knowledge. And you have got it in the best way, the most likely for it to be preserved and of use ; for it does not fall on the mind while in an inert or uninterested state, to be idly received and passed over into oblivion ; but the mind, being excited on the point, receives the information with appetency, makes it its own, and works it into its system. Thus by a daily but easy effort a man, with however scanty leisure, may make a sensible and steady progress in knowledge. There is one other remark, Sir, which I should wish to make with your permission. It is of a more serious nature, and will perhaps come best from myself. I would say that our possession of this library lays a responsibility on us. It is a maxim of universal application, an axiom in morals, that privileges imply duties, opportunities bring responsibilities. We are responsible, then, that we use this library, and use it well. Not to use it at all would be a very thankless return for the privilege, and argue great insensibility in

ourselves, and little desire for improvement. But we must also take heed that we use it well, for unhappily it is not impossible to do otherwise. For instance, to feed only on the light things which amuse the fancy and move the feelings would be an unprofitable use of it ; for it would beget a mental flatulence and dispepsy, and unfit us for digesting anything solid and nutritious. To read and study in a spirit of pride and dogmatism would also be hurtful, at least as to morals, and they rank before intellectuals ; for it would be to turn our treasures into the food of pride, one of the great faults of our nature, the antagonist of all excellence and improvement. And much more would it be an ill use to sever between the intellectual enjoyments which we gather here and the thought of Him who is the source of them all, who is Himself the Supreme Intellect, the Divine Artificer,—the former both of our minds and of all things which occupy them. I am persuaded that the fields of knowledge can be explored in a manner suitable to beings of our spiritual mould and fashion only when the search through them is accompanied by an unceasing recognition of the Omnipresence in them of the Divine Mind ; by an unvarying ascription unto Him of all that is mighty in operation and admirable in excellence, by a desire to track out His footsteps in all the expanse before us, and by veneration of His power and wisdom and goodness, His exquisite skill and taste, as discovered by every part of His manifold works. So it was that the first name in philosophy, our own profound Newton, studied nature even as God's handiwork ; finding everywhere, with humble and pious reverence, the traces of the Divine Architect, and adoring His infinite perfections throughout the whole range of his matchless discoveries. In him we have an example of the harmony between piety and philosophy ; and of their elevating effect when joined in religious union. And truly a noble and a holy thing is human knowledge, when imbued with piety, and rendered subservient to higher and heavenly mysteries ; for it brings man nearer unto that which is divine, and is a pathway unto the glorious destination to which the pure in heart are called. With these imperfect observations, I beg to move that the thanks of this meeting be given to the Committee for their services during the past year.

The CHAIRMAN :—Before putting the question, I should wish to say a word or two, to express the pleasure with which I, and I am sure you too, have heard the remarks of my reverend friend Mr. MAITLAND. I am the more pleased that those observations have been made, because they have in some degree—indeed in a very sufficient degree—supplied what I feel to have been a vacuum in my opening address. It is quite true that the Chairman at the annual meeting should consider himself counsel for the institution, and like every other counsel know nothing but his client. In the direct advocacy of the library to-day I may seem to have been wanting. But I would say, in my own defence—not that my reverend friend has put me on my defence, far from it—that, in taking office to-day I was peculiarly situated. There is a witness here who can avouch my statements and who spoke to me regarding the chairmanship in a way from which I gathered that the Committee, having thought of this body and that body, had at last said to each other, “It can’t be helped ; get the Attorney-General !” When asked, however, I said, it is impossible ; I have been chairman before, and have said my say ; I have no new matter, I can’t serve. “You don’t mean to say,” said Mr. JARDINE, “that you officiated as our chairman ?” I replied that I certainly did mean to say so, and that the matter was beyond a doubt. Our friend was for some time incredulous, but at length consoled and complimented me by the assurance that everything I then said would be utterly forgotten by everybody else as completely as it obviously had been by himself. But what I formerly delivered remains recorded against me in print, and could not be repeated, and under these circumstances I am glad that the claims of the Public Library have been advocated, in the presence of this company, in the way in which they have been ; since the perpetually changing nature of our society here renders an annual renewal of such advocacy most expedient. I am, therefore, glad to have heard an Englishman, of cultivated mind, and comparatively a stranger yet in the Colony, give utterance to his opinion of the advantages which this institution is calculated to confer on our community. No doubt, as he strikingly

observed, the sight of a great library creates a sinking in the mind of everyone who reflects how little of what is therein contained he knows, or is likely ever to know. There they are, shelves over shelves, piled with volumes of which many of us have hardly time to read the titles, and under these circumstances a man, who, in some profession or calling, lives by his labour, may seem excluded from the hope of making any decided impression upon such a mass of matter. What then? May he not do something? Pope says, you know, that "a little learning is a dangerous thing." It may be so; but surely no learning is more dangerous. There is an adage, and every hungry man feels its force, that "half a loaf is better than no bread," and I think the proverb a better one than Pope's. There is almost no man to whom this library may not be most serviceable. Want of time may be pleaded, but where there is a will there is a way, and if there be a taste for reading it will, in some way or other, manage to be gratified. Consider what a debt we owe to those who wrote the books around us. There is scarcely a volume there, old or valueless as you may view it, and one which you would contemptuously cast aside, which the author, by the midnight lamp, has not laboured at with care, and toil, and hope, and an interest which gives it some degree of worth. To those benefactors of their race who have produced these books, who are gathered to the narrow house and the long sleep, we owe a debt of gratitude which we only pay by prizing the books they have produced. Following up the idea thrown out by the preceding speaker, I have made these remarks, and I was only deterred from insisting before on the character and claims of the library because I had already borne my testimony, and could add nothing to what I then declared. But I may now express my conviction that this library is the very best institution in this Colony, and that the colonists can never cherish it too much. Now the circulation of its books is as certain and as regular as the circulation of the blood. We can't value it without thinking of the disastrous effects which would be produced if by any convulsion of nature the ground opened and it sunk from out our town. The consequences would almost be that those upper ranks, from whom

knowledge and civilization should naturally descend to those below them, would themselves run the risk of falling into what, comparatively speaking, I might term a sort of barbarism. I have not considered it improper to interpose these few remarks, and I now beg leave to put the question, which is, that the thanks of this meeting be given to the retiring Committee for their services during the past year.

The motion was carried unanimously.

Thanks were then most cordially awarded to the Chairman, and the meeting separated.

ON NATAL BEING FORMED A SEPARATE PROVINCE.

[*Legislative Council, August 21, 1845.*]

The ATTORNEY-GENERAL said :—I have the honour, Sir, on the part of His Excellency the Governor, to submit to the Council, for the purpose of being read a first time, the draft of an Ordinance in respect to which it may be convenient that I should make one or two explanatory remarks. The Council are aware, and the public also, that it some time ago pleased Her Majesty the Queen to declare her intention to establish in the District of Port Natal a British Government. For a considerable period the precise nature of that Government was not communicated by the Queen ; but it has appeared to Her Majesty, for reasons into which her responsible advisers have very largely entered, that the District of Port Natal should not be created, for all purposes, a separate and independent Government ; but, for certain purposes, should be constituted a part or portion of this Colony. Being of opinion that in regard to all judicial, financial, and executive arrangements, a practical separation may conveniently be had, it has at the same time appeared to Her Majesty that the legislation for Natal may most

fitly and advantageously be conducted, at least for a time, by the Legislative Council of this Colony. For this purpose, and in order to effectuate these gracious intentions, Her Majesty has caused to be issued certain Letters Patent, which I hold in my hand. The effect of these Letters Patent is so clearly and succinctly stated on the face of the instrument itself, that it may not be inexpedient that I should read the enacting clauses to the Council :

“ Whereas by Letters Patent under the great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at Westminster, the Nineteenth day of December, One Thousand Eight Hundred and Forty-three, in the Seventh year of Our Reign, We did constitute and appoint Our Trusty and Well-beloved Sir Peregrine Maitland, Knight Commander of the Most Honorable Military Order of the Bath, Lieutenant-General of Our Forces, to be Our Governor and Commander-in-Chief, in and over Our Settlement at the Cape of Good Hope in South Africa, with its Territories and Dependencies, as also of the Castle, and all Forts and Garrisons erected, or established, or which should be erected or established, within the said Settlement, Territories, and Dependencies.

“ And Whereas, since the date of the said recited Letters Patent, it hath seemed good to us to annex to the said Settlement of the Cape of Good Hope, the Territories occupied by Our Subjects throughout the District of Natal, in South Africa ;—Now know Ye, that We of Our especial grace, certain knowledge and mere motion, have annexed, and do hereby annex, the said District of Natal to Our said Settlement of the Cape of Good Hope, as a part and portion thereof.

“ Provided, nevertheless, and We do hereby declare Our pleasure to be that no law, custom, or usage now in force within Our said Settlement of the Cape of Good Hope, shall by force and virtue hereof extend to and become in force within the said District of Natal, and that no Court or Magistrate of or within Our said Settlement of the Cape of Good Hope shall by force or virtue hereof acquire, hold, or exercise any jurisdiction within the said Colony of Natal, but that it shall be competent to and for the Legislature of Our said Settlement of the Cape of Good Hope to

make, ordain, and establish all such laws and ordinances as to them shall seem meet for the peace, order, and good government of the said District of Natal, whether in conformity or not in conformity with the laws and ordinances in force within the other parts of Our Settlement at the Cape of Good Hope, any letters patent, charters, orders in council, local ordinances, or other law or usage to the contrary notwithstanding. Provided that, always, all laws and ordinances, so to be made as aforesaid, for the peace, order, and good government of the District of Natal, shall be so made in such and the same manner, and with, under, and subject to all such and the same conditions, restrictions, and reservations as are or shall be in force within Our said Settlement, in respect to the making of laws and ordinances for the peace, order, and good government of the other parts thereof. *And We do hereby reserve to Ourselves full power and authority to revoke or alter these presents, as to us shall seem meet. In witness whereof, We have caused these Our Letters to be made Patent."

This, Sir, is the substance of these Letters Patent ; and the legal effect of this instrument unquestionably is, to annex to this Colony, as a part or portion of it, and for all legislative purposes, the District of Natal. Two important questions, therefore, necessarily arise : one having reference to the duties of the Executive Government, and the other, to the functions bestowed on this Council by this instrument. The first has relation to the limits or boundaries of the Natal District. It will be observed that in the Letters Patent no geographical description is given of the place. Her Majesty's Government have, however, devoted great attention to this subject, and it is His Excellency's intention, in to-morrow's *Gazette*, to announce the boundaries by proclamation. Under these circumstances, the boundaries being determined, and a defined district thus annexed, the next question arises—in what position, in fact, does it now stand with respect to the law under which persons resident in it are supposed to live ? It will be observed from the Letters Patent that Her Majesty, from a desire of avoiding the necessity, or rather for excluding all chance, of forcing upon her Natal subjects any system of laws or usages not suitable for

their circumstances, has left it to this Council to legislate for their peace, order, and good government, in such a manner as to this Council may appear just and proper; and for the purpose of allowing this Council a clear stage—an open field—Her Majesty has entirely removed any former system of law which may be supposed to have followed her subjects to Natal, and to exist there for their guidance and control. There can be no doubt that a certain legal consequence, which Her Majesty clearly foresaw, and has as clearly excluded, would have followed a simple annexation, which would clearly have had the effect of carrying into the new territory all the laws that existed in the old. I believe this question was, in connection with some bygone transactions, a good deal canvassed when Adelaide was intended to have been made permanently a portion of this Colony. I apprehend that the legal consequence of an unqualified annexation would be to introduce the laws of the Colony, which would at once flow into and over the territory annexed. Foreseeing this legal consequence, it has appeared to Her Majesty desirable, for the purpose of allowing only such laws to be extended to Natal as the circumstances of Natal required, that this result should be expressly and in terms excluded. Words have been used, therefore, in these Letters Patent, by which that legal consequence is expressly excluded. Here you have annexation with a declaration that the annexation shall not have the effect which, without that declaration, it would by law have produced. This leads us to view the question in another light. It will appear that after annexation all previous law is annihilated by this instrument at Natal, and if no new law be introduced to fill the void that district will be reduced to the anomalous and unfortunate condition of a country totally destitute of any provision for the repression or punishment of crime, or by which contracts and dealings between man and man can be estimated. It is not desirable that such a state of things should exist one moment longer than it is in the power of the Council to prevent it, and in order that we should not wait until those further laws and ordinances are passed, which may be necessary to establish a court

or courts, and make provision for what shall be the constitution and proceedings therein—and a number of other matters which will need some time and labour—it has been deemed expedient to introduce at once a measure which shall carry to Natal a certain body of law, without waiting the erection of the court or courts to be charged with the execution of the law thus introduced. I have therefore been instructed by the Governor to prepare the Ordinance which I now lay on the table, and which, as it is a very short one, and sufficiently, I trust, expresses its own meaning, I shall read to the Council :

“ Whereas it has pleased Her Majesty the Queen, by certain Letters Patent, bearing date the 31st day of May, in the Seventh Year of Her Reign, to annex to this Settlement of the Cape of Good Hope, as a part or portion thereof, the district of Natal in South Africa : And whereas by the said Letters Patent, it is amongst other things provided that no law, custom, or usage in force within this Settlement should, by virtue merely of the said Letters Patent, extend to or become in force within the said District of Natal ; but that it should be competent for the Legislature of this Settlement, subject to the limitations, conditions, and provisions in the said Letters Patent mentioned or referred to, to make, ordain, and establish all such laws and ordinances as to them should seem meet for the peace, order, and good government of the said District of Natal : And whereas His Excellency the Governor has signified his intention forthwith to declare, by a proclamation to be by him issued in virtue of certain authority in that behalf in him vested, the limits or boundaries of the said District of Natal, and to define the territory or territories which shall constitute the said District : And whereas it is expedient, without awaiting the legislative establishment within the said District of the court or courts for the administration of justice, which is, or are now, about to be created, to make provision for the establishment of such laws as are immediately and indispensably required for the preservation, in the meantime, of peace and good order, and the repression of violence, injury, and injustice amongst all persons resident in the said District : Be it therefore enacted by the Governor of the Cape

of Good Hope, with the advice and consent of the Legislative Council thereof, that the system, code, or body of law commonly called the Roman-Dutch Law, as the same has been and is accepted and administered by the legal tribunals of the Colony of the Cape of Good Hope, shall be, and the same is hereby, established as the law, for the time being, of the District of Natal (as the said District shall, from time to time, be limited and defined by or on behalf of Her Majesty the Queen), and of Her Majesty's subjects, and all others residing and being within the said District : Provided, however, that nothing herein contained shall be deemed or taken to establish within the said District any law or ordinance heretofore at any time made or passed in this Colony, by or through the Local Government or Legislature thereof, or to give any existing Court or Magistrate of the said Colony any authority or jurisdiction over or in regard to the said District, or to prevent the said system, code, or body of law from being hereafter added to, or altered, in regard to the said District, by any competent authority." The effect of this, it will be perceived by the Council, is to introduce that body of civil and criminal law under which the inhabitants of this Colony generally live. Local ordinances which have from time to time been made, both by the Dutch and English Government, are not introduced ; it being the intention of Her Majesty that these laws, so far as they are applicable, shall be made applicable to that particular machinery which may exist at Natal, and without which it would be exceedingly difficult to introduce them in a body, or as I should say, in the lump. Considerable care will be needed to alter such local ordinances as shall be introduced in such a manner as to suit them to a different mode of operation from that which prevails here. Those things must come hereafter, but this Ordinance introduces the criminal and civil law, as respects crimes and punishments, as well as the contracts and dealings of private parties ; and with this, Natal can easily exist for the short period that will elapse before the other laws required for the good government of Natal shall be furnished by this Council. With regard to crimes, we must do something more than introduce a law for punishing them hereafter. Before a court

can be established crimes may be committed, and the criminals escape, and therefore I have thought it necessary to frame a second section to guard against that contingency :

“And be it enacted, that it shall and may be lawful for the Governor aforesaid to address to any one or more of Her Majesty’s subjects residing within the said District one or more commission or commissioners, authorising him or them to exercise within such District the office of a magistrate, for the purpose of preventing the perpetration therein of any crimes and offences punishable by law, and for the purpose of arresting and committing to custody for trial before the certain court or courts now about to be established within the said District any person or persons charged, on sufficient evidence, with the commission of any crimes or offences within the said District : Provided always that every such commission shall be revocable at pleasure ; and provided also, that any person committed for trial by any such magistrate, who shall not be brought to trial within six months from the date of his commitment, shall at the expiration of such term of six months be discharged from custody, upon entering into his own recognizance, conditioned in such sum as shall appear just and reasonable, to appear before any such court or courts as aforesaid, when duly summoned so to do, there to answer to any such charge as may be preferred against him. And be it enacted, that this Ordinance shall commence and take effect from and after the date of the promulgation thereof.”

In this case, therefore, it will be the duty of the Executive Government to create such a magistracy as may prevent crime, and apprehend criminals, and commit for trial before the Court about to be established. In order that, in a place where there is as yet no writ of *Habeas Corpus*, or, at all events, no court to issue it, parties arrested should not be detained for an unreasonable length of time in custody, it is provided that if not brought to trial within six months they shall be discharged upon their own recognizance ; but it is contemplated that the judicial system of the District will be in operation in ample time to avoid all inconvenience. It only remains that I should state my view as to the course which should be taken with this Ordinance. I

should certainly have wished that, for reasons which will be obvious from what I have already said, this Ordinance might have appeared in to-morrow's *Gazette*, together with the proclamation fixing the limits of Natal, and the Letters Patent, that with the first public announcement of the vacuum regarding law which the two latter instruments create, there should also have been announced the mode in which that vacuum is to be filled. But on account of a certain difficulty which may possibly exist, and which I shall now state, I consider it more expedient to recommend the Council to read the ordinance a first time to-day, publish it to-morrow, and then meet again on some early day next week for the purpose of putting it through some of its further stages. The difficulty to which I have alluded regards the necessity or non-necessity of a promulgation by the Governor of these Letters Patent, previously to their obtaining force. I am myself of opinion that such previous promulgation is not necessary. Whatever, under the Roman Dutch jurisprudence, may be the necessity of previous promulgation in order to make laws obligatory, a point on which I offer no opinion, I do not regard Letters Patent annexing territory as laws. I am aware of no definition of a law under which such instruments could come, and it appears to me that, without speculating as to the particular time from which these Letters took or are to take effect, whether from their date, or from some subsequent period, no publication in the *Gazette* is necessary for the purpose. If, however, the opposite principle be the sound one, we could not regularly pass this Ordinance to-day, since it is by the Letters Patent that we receive the power to pass it, and since the Letters Patent are not yet published, I am, as I have said, of opinion that we have now the power to pass this Ordinance. But seeing that the difference of a week will not be of any practical importance in this case, considering the nature of our posts to Natal, and that it will be as well for the Council to take a day or two to consider the provisions of this Bill, I should advise, in order to keep clear of all doubt, that we should now read it a first time, and, if approved of, pass it next week in time for that week's *Gazette*. I am not aware that any further observations are required

for the purpose of explaining this short Ordinance, and I now beg to move that it be read a first time.

ON THE FRONTIER.

[*Legislative Council, October 2, 1845.*]

THE ATTORNEY-GENERAL said :—I have really felt, Sir, during the time my hon. friend was addressing the Council, considerable doubt whether it would be right or proper for me to touch, upon the present occasion, this wayward subject of our Frontier policy. I have now in my own mind determined that it is right and proper so to do. That determination has not been governed by any feeling that the clear and able statement of my hon. friend requires any supplement. He has gone fully and fairly through the petitions which have been presented, and the allegations which they contain ; and stated his reasons for believing that certain of those allegations are either groundless, or overstated, and that the petitions, in their general tone and bearing, do not convey an accurate idea of the existing state of things. But notwithstanding the completeness of my hon. friend's address, and the fact that no unofficial member has deemed it necessary to continue the discussion of the question, I have thought it well to give expression to my sentiments upon the subject, because I know that an impression prevails upon the Frontier that, with the members of the Government, these matters do not meet with the consideration which they merit. It may be supposed, indeed it has been often said, that as the Frontier is not represented in this Council by any unofficial member territorially connected with it, the state of the Frontier is not sufficiently understood or pressed upon the notice of the Executive ; and I am the more anxious, as a member of Your Excellency's Council, and one who has given his best consideration to the subject, to state for myself the conclusions at which I have

arrived, and the reasons which have led me to them. But this, Sir, is not all. I cannot but feel that the able, and beyond all parallel and precedent, dispassionate speech of the Secretary to Government, will not, when reported, give satisfaction on the Frontier. When men's minds are heated beyond a healthy state, the utterance of impartial truth never gives satisfaction. My hon. friend, speaking with great care and caution, and the most sincere desire to avoid giving offence, will yet, I am certain, give offence. He has, I believe, delivered an unpopular speech, and believing that he has done so, I deem it right to follow him in the course that he has taken, and to claim my share of whatever unpopularity may attend the announcement of principles and sentiments in which we are cordially agreed. Sir, although my career in this Colony has not yet been a long one, it has yet approached a period of seven years, and during that time I have not been entirely neglectful of the opportunities which occurred of informing myself respecting the past history and present state of our Frontier relations; and I set out by declaring my conviction, a conviction formed after an attentive reading of documents laid before Parliament, and such other authentic sources of information as have come my way, that at no former period in the history of this Colony, from the day of Van Riebeck's landing to this present moment, were our Frontier relations, comparatively speaking, so comfortable as at present; that never did our colonists suffer so little from native tribes beyond their boundary as they do at this very time. Now, don't misunderstand me. Let me guard myself against being supposed to think, or say, that evils, and serious evils, do not now exist. I at once and unhesitatingly admit that such evils do exist. But it is a peculiarity of this case, and of all such cases, that you cannot call in question any statements regarding those evils, however groundless or overdrawn, without being liable to be held up as disregarding the evils which you attempt to reduce. Mr. Canning, somewhere, refers to this sort of thing, which may be called the fallacy of exaggeration. "A declaimer asserts," says he, "that a hundred men were cruelly cut down at Manchester. 'Oh no,' you say, 'not a hundred, only ten.' 'Listen to the monster,' cries the other,

‘only ten ! the cutting down of ten men is then, it seems, a matter of no moment ! ’” I look at these petitions, and I see that, in one place, the condition of the Frontier colonist is described as “unbearable,” and that, in another place, their sufferings are called “frightful ;” and when I say, in reference to these strong terms, that their condition is not altogether unbearable, and that frightful is much too strong a word, that the depredations are not so and so, but only so and so, I am set down as disregarding the complaints of Her Majesty’s subjects, and as wholly wanting in sympathy for their situation. Sir, so far as their complaints are just and reasonable, they have my fullest sympathy. They have my sympathy the more, because I know that, whatever may have been the case in past times, our Frontier colonists, considered as a body, nay, even considered individually, are now, and long have been, guiltless of provoking by aggression the aggressions from which they suffer. And without admitting the correctness of strong statements, and while allowing much for colouring in the glowing pictures of distress which are from time to time presented, I do not hesitate to say, with the Secretary to Government, that, when every deduction has been made, and the evil is brought down to its true magnitude, it is one of a nature calculated seriously to retard the prosperity of the Frontier. But retarded prosperity is not utter ruin. That the condition of the Frontier is unbearable and frightful, I never can believe, so long as I have it demonstrated, not by set speeches, which aim at effect, not by words, which are wind, but by the convincing logic of selling and buying, by the prices which men ask and which men give, that the value of property in the quarters in which these depredations prevail, instead of sinking, has risen, and is rising, and allowance being made for fluctuations in the money market, never stood so high as it does now. Will any respectable man come forward and deny that the prices of land have risen in the face of the Kafirs and their depredations ? Will any man deny that farms on the immediate frontier which, fifteen or twenty years ago, were purchased for a trifle too small, almost, to be reckoned as a valuable consideration, can now be sold for a consideration large enough to justify, in the fullest sense, the use of

the term valuable? Sir, I once before made in this Council a similar remark. What I then said, wafted by the wings of the press, went to the Frontier. There, it attracted the notice of a speaker at a public meeting, I think Mr. Godlonton, the respectable proprietor of the *Graham's Town Journal*. Did he deny the fact? Sir, if my memory serves me, he did not deny it. But tacitly admitting, as it seemed to me, the existence of the fact, he said that I drew from it an erroneous inference, not making sufficient allowance for that indomitable spirit of energy and enterprize in British settlers, to which alone the fact was to be traced. Come it however from what cause it may, property on the Frontier has steadily advanced in value. There are two ways of accounting for it; one by alleging that British settlers are so enterprizing and energetic as to outbid each other for farms worse than worthless, and that they have an abstract fondness for rushing upon ruin; and the other a very plain, prosaic way, I admit, by alleging that, bad as matters are, they might be worse: that in the face of Kafir depredations men live and thrive, and that the article which is purchased is—after all just and fair allowances—worth the money. In truth, Sir, I hardly think that it is the actual value of the cattle stolen—considerable though that be—which constitutes the chief grievance of these cattle thefts. A man might lose twice as much in another way, without feeling half the annoyance. It is inconceivably provoking, when you get up in the morning, to find your horse gone, or some cattle, of perhaps superior breed, to which you attached great importance. If they had been lost by sickness, or ordinary accident, or the action of the elements, you could keep your temper. But to have them hunted off into Kafirland by thieves, is perhaps of all modes of loss the most irritating; and I am therefore not at all surprised that men, smarting under such irritation, make speeches, and vote resolutions, and draw up petitions, which require other men, whose duty it is to adopt practical measures, to make large allowances for the excitement under which the complainants labour. Are matters so bad as these petitions say? By no means. Taking the Colonial Border as a whole, am I wrong in stating that, within a period of twenty

or thirty years, the part of the Border most disastrous to the Colonists was not the Kafir Border ; I could lay my hand upon, and, if necessary, produce, the best authority for saying that a marked distinction had been at all times observable between the incursions of the predatory Bushman Tribes into Clanwilliam, Beaufort, Graaff-Reinet, and the incursions of the predatory Kafir Tribes, with which we came in contact at a comparatively recent period of Colonial history ; that distinction being that, whereas the former, then in considerable numbers, were accustomed to butcher wholesale the Colonists and their families, sparing neither sex nor age before driving off the booty, the latter from the first came but for cattle, and that obtained, evinced no thirst for blood. The Kafir Frontier was, in those days, considered comparatively safe. How is it now with that portion of our Frontier which was of old the worse ? Why, owing to a combination of circumstances which I need not pause to specify, and in no small degree to the acts of the Griquas in breaking and destroying (cruelly and for their own purposes, I admit) the Bushman hordes, a sense of security exists all along that boundary which formerly was beset with the most formidable dangers, and all our solicitude is now concentrated upon the Eastern Border, where the aggressions of the Kafir continue to retain their original character ; for although extremely provoking, and not a little destructive, the Kafir comes now, as he has always come, for cattle, and having secured these, he is not anxious to dip his hands in blood. It will be no answer to this to say, "Do you forget that De Lange was shot, and that several others have been shot at ?" I admit this. But my recollection corresponds with that of the Secretary to Government, and I call to mind no instance in which the Kafirs have fired until first fired upon ; and it is by no means in every instance that they have returned the shot. My hon. friend, in speaking upon this point,—while making the most liberal allowance for the colonists who first fired,—let fall something to the effect that their so firing was illegal. I may mention to my hon. friend and the Council, in order to avoid misapprehension, that whether the colonists were or were not justifiable, in point of law, would depend upon the particular circumstances of the case. Any

person who, upon fresh pursuit comes up with a cattle stealer, may, by law, shoot the cattle stealer, provided he cannot by any other means be secured and made answerable to justice. In all such cases the jury question is, whether any other means did, in fact, exist ; and my hon. friend does not, nor do I either, mean to say, or to insinuate, that in any instance in which colonists have fired upon and killed Kafir depredators, they were not fully justified in so doing by the circumstances of the case. All we mean to say is this, that when a Kafir,—who never heard of Ordinance No. 2, 1837, and who is attempting to escape,—finds the bullets of his pursuers whistling about his ears, his falling back upon his rude notions of self-defence, and his natural desire of self-preservation, would scarcely justify us in saying that his firing upon those who first fired upon him is, in a moral sense, bloodthirsty or malicious. Sir, the general principle of the new treaties and of Your Excellency's policy in relation to the Kafirs, have been so fully entered into by my hon. friend, that I shall not follow him. Were I to do so I should, I am certain, only do ill what he has done well. But there is, I think, an observation which I am entitled to make. I am entitled to say to anyone who objects, "If you do not like the system, give a better !" Mr. Cockle, who makes the celebrated pills, quotes Horace in recommending them, and for general convenience translates him too : "If you know any better pills than these," he says, "candidly inform me ; if not, use these with me." So says Mr. Cockle after Horace, and so he sells his pills. Now where are we informed of the better policy for the Kafirs ? It may be answered, you have it in the petitions presented to the Council. Let us see, then, the prayer of the first petition, I mean that presented by my hon. friend on my left (Mr. Ebdon). It involves two particular points, and only two ; one to remove the seat of Government to the Frontier, and the other to give Government a monopoly of gunpowder. Behold the mystery of a sound Frontier policy ! Behold the way in which Kafir depredators are to be put down ! And my hon. friend, in presenting this petition, took especial care to guard himself against being supposed to concur with the petitioners. Am I blaming him for this ? Not so. It was due to

himself, to his character, to his position in the Colony and in this Council, not to leave his sentiments undisclosed. But the result is curious. For here is my hon. friend recommending a petition to the most serious consideration of Your Excellency and the Council but saying at the same time, "Let me not be understood as advocating a removal of the seat of Government or a monopoly in gunpowder;" when, upon looking into the petition which we are seriously to consider, we find that it suggests merely the very two points which my hon. friend considers to be mistaken. Now I mean to offer to these petitioners no sort of disrespect. But I must say that when they present a petition suggesting measures which not even the member who presents it can support, I cannot entertain a very exalted opinion of their political wisdom; and while I sympathize with their feelings, I entertain no admiration whatever of their judgment. The removal of the seat of Government is certainly a weighty question. With my hon. friend, I am against it. But I speak of it with respect, because it is a project, which, at one time, was recommended by the eminent man who then held this Government, Sir Benjamin D'Urban, and nothing which such a man considered expedient could be dismissed by me without much consideration; because I would rather conclude that I had overlooked some good reason, than that he had come to a wrong conclusion. For practical purposes, however, it is enough to say that we could not change the seat of Government even if we would. But I will go further, and say, that if Your Excellency and all the other people who hear me were now sitting in a room in Uitenhage, I entertain great doubts whether a single ox or horse the less would be lost to-day in Albany. Next, the petitioners pray the Government to take a monopoly in gunpowder. The history of gunpowder legislation in this Colony is a very simple one. The Dutch Government was a paternal Government, and if it often used the rod as not hating the child, it was only so much the more paternal; and, therefore, as in duty bound, the Dutch Government asserted an absolute monopoly. Lord Macartney, in 1797, opened the trade, but opened it, so to speak, only with half a hand. The Gunpowder Ordinance of 1833, passed by Lieutenant-Governor Colonel Wade,

went farther, but it imposed heavy duties. While this Ordinance was in the Colonial Office, under the consideration of Mr. Secretary Spring Rice, the Cape Trade Society of London, by their chairman, my excellent friend Mr. Abraham Borradaile, who has just left the Colony, presented a memorial against the heaviness of the impost. They pointed out the utter absurdity of supposing that, upon such a coast, with the Portuguese Settlement of Delagoa Bay, and American vessels constantly on the watch, gunpowder could be kept from any native tribes who had the desire and the means to buy it. These reasons weighed with the Secretary of State. Colonel Wade's Ordinance was disallowed, and one of the first acts of Sir Benjamin D'Urban was, to pass another Ordinance of the same nature, but with considerably lower duties. The whole history of this gunpowder legislation, and the nature of the thing, lead me irresistibly to the conclusion that there never was a more frantic notion entertained than that of retracing our steps in that direction,—of again undoing all that has been done,—of going back to darkness from the light, of setting up a miserable monopoly of gunpowder as a protection against Kafir depredations. As I imagine that there is no difference of opinion upon the point, I quit the first petition, and come to the second. This speaks first of an effective police. This subject has been adverted to by my hon. friend, the Secretary to Government. It was never intended that the disbanding of the Kafir police should leave the Frontier without an effective substitute, say, the Cape Corps, or some other body and the new treaties, as Your Excellency kindly reminds me, are framed so as to leave room for the introduction of whatever force may be deemed most serviceable. Next, the petitioners desire the appointment of an Agent-General. Sir, an Agent-General has been appointed, whose talents, character, and station, warrant me in anticipating that in the discharge of the important duties entrusted to him, he will not disappoint the reasonable expectations either of Your Excellency or the Colony. In the third and last place, the petitioners ask for the Court of Appeal. My hon. friend has given its history. Your Excellency will be misunderstood if it is supposed that you

have truckled, upon this point, to the Gaika Chiefs. It is true that they objected to the Court of Appeal, declaring their preference of the usual quarterly meetings. They had a right to do this. Your Excellency proposed a treaty to them, and it would be to "keep the word of promise to the ear and break it to the hope," if you were, after proposing what purported to be a treaty, to force upon them, against their will, a condition such as this. The object was not of sufficient moment to require to be forced. It never struck me, and I believe it never struck Your Excellency, that the Court of Appeal was an essential part of your system, and I do not hesitate to state my opinion that by the assistance and advice of the Agent-General, part of whose duty it should be to attend as much as possible the sittings of the several Resident Agents, such a degree of intelligence, uniformity, and public confidence, will speedily distinguish the Courts of the Resident Agents, that no desire for a formal Court of Appeal will exist on either side the boundary; it being, I think, very obvious that upon the hearing of such cases, an efficient Court should be empowered to pronounce final judgment, since much of the evidence is of a perishable nature, and since no machinery for appeal can ever compensate for defective Courts of first instance. Look at the treaties for the suppression of the Slave Trade. Property to an immense amount is sometimes under adjudication in the Mixed Commission Courts. But the High Contracting Parties give no appeal; content with doing what is far better, giving efficient Courts for final judgment. I have now gone over the several matters which are referred to in these two petitions; and the Council will, I think, be of opinion that, except when they refer to steps which are either contemplated or actually taken, they contain nothing which can conduce to the improvement of our Frontier policy. Do the petitioners ask more? Do they ask Your Excellency to give their concerns your attention? The Secretary to Government has spoken of this. Early and late Your Excellency has given your best attention to these concerns, assisted by your Executive Council, so far as they were able to assist you. Nothing connected with your Government has occasioned you, so far as I can form an opinion, half so much solicitude. If Sir Robert Peel's

difficulty was Ireland, Your Excellency's difficulty has been the Frontier. Things in that quarter are not yet as you would wish, but they are improving, and I am sure you will omit no means in your power of bettering them still more. Declamation and denunciation will do no good. Evils by the score may be readily pointed out, nothing is more easy ; but for a practicable plan, and a plan which shall be proper as well as practicable, where are we to look ? If we look back to the beginning of our Colonial system, what do we see?—Why we see the old Commandos. Do I name them to defame the character of the Colony, or to say, as has been said, that the Commando System was a deliberate plan for plundering others under the pretence of being robbed ourselves ? By no means. The Commando System was a necessity of the time. It was a hard, but as matters stood, the only, remedy. Doubtless it was often abused, because there will always be bad men to abuse every system, and because the Commando System was one particularly open to abuse. But I have not yet seen the evidence to prove that, as a system, it was not acted upon *bona fide* for the redress of what were considered injuries. Is it, therefore, a system to be restored ? No. It was the child of anarchy, and it aggravated the evil from which it sprang. Without any other means of obtaining compensation, and as regarded the Bushman hordes, without chiefs with whom arrangements for compensation could be made, it was but natural to track, as well as might be, the plundering party, to retake from them, or others, the value of the loss,—and by the exercise of terrible severity, to deter from a repetition of aggression. But the Commando System, in its best estate, confounded the innocent with the guilty, entrusted a most delicate duty to a class of people who could not be expected to discharge it temperately, created a universal feeling of hostility on every side, and inevitably precipitated consequences which must, in regard to such a people as the Kafirs, lead to a general war. This I hold to be clear ; for light does not more surely follow the rising of the sun than must a Kafir war follow a restoration of the Commando System. But some men will say, “ Let us have a war.” Is this, then, a small thing ? My hon. and learned friend (Mr. Cloete) spoke but

shortly in reference to the petition which he presented, thinking, probably, that situated as he is, already virtually a judicial officer, though still nominally vested with legislative functions, it is not desirable for him to enter into these questions as he might otherwise have done ; and I quite understand and approve of the delicacy of such a course. But my hon. and learned friend was at liberty to observe that the present generation had seen three Kafir wars. Who are they that will take the responsibility of bringing on a fourth ? Two of the byegone wars I shall not speak of. What were the consequences, to the Colony, of the last ? How many horses were then lost ? 5,438. How many head of cattle ? 111,418. How many sheep ? 156,878. How many houses destroyed ? 455. The number of killed was comparatively small, but still about 100 men, soldiers and civilians, lost their lives. And who can measure the amount of suffering which was entailed when 7,000 of our people were reduced from competence to destitution, and seen flying, like hunted sheep, seeking for shelter and protection ? These things the Kafir war cost the Colony ; and it must, besides, have cost the mother country not less than some half million of money. With this experience before me, I cannot bring myself to talk lightly of a war. I wish from my heart, that speakers at public meetings on the Frontier, when they talk about it, would weigh their words a little better. One of the resolutions on which a petition before the Council was founded, calls Kafirland a "mine," and speaks, I think, of a single spark thrown into it as likely to cause explosion. Similes should be kept for speeches, and resolutions are no place for figurative language ; but if Kafirland be the mine it is represented, should not the speakers I refer to be very careful how they throw into it their inflammatory rhetoric ? No doubt, in the last war the sufferings were not all colonial. But was it any comfort to us that the Kafirs were at length chastised ? that 4,000 fighting men of theirs were killed, that 60,000 head of cattle were taken from them, that their gardens and their corn lands were utterly destroyed ? None. None. None. And no man ever felt this more than the humane and distinguished officer whose public duty it became to protect the people under his Government

from what he conscientiously considered, and I think in the main, not unjustly considered, an unprovoked aggression. I deprecate another war ; and as an abrogation of the present system, and a restoration of Commandos, would inevitably bring on another war, I set my face against the change. I shall be told that my principles are cowardly ; that I fear the Kafirs. This is not the case. I am not afraid of the Kafirs. I hold it to be idle to imagine that, in the long run, their undisciplined masses could resist the invincible might of British troops, supported by the courage of a colonial population accustomed to conflict in the bush. But though not afraid of the Kafirs, I am afraid of the human misery by which the ultimate expulsion or extermination of these people must be purchased. Sir, after all, it is possible that this Colony may be forced into a Kafir war ; and if so, that war, in my opinion, should be so conducted as to prove to be the last. But never draw the sword until you have tried every other means, and tried them to the utmost, and tried them in vain ; never, until you have, by your forbearance, put the Kafir completely in the wrong ; never, until matters are in such a state that no good man can doubt the sad necessity under which you lie ; never draw the sword, I say, so long as it can possibly be suffered to remain in the scabbard, but when once you draw it, destroy. But it will be said, "Take in the territory. Put the Kafirs beyond the Keiskamma, or leave them where they are, but at all events take in the territory ; by this means only can you keep the Kafir from your cattle." That such a measure would have the alleged effect, I doubt. But waiving that, let me ask, what brought on the war of 1834 ? Was it not a question about territory ? In 1780 the boundary between the Colony and the Kafirs was, as now, the Great Fish River. In 1819, Lord Charles Somerset carried forward the boundary to the Keiskamma. The moral justifiableness of that measure has been discussed ; but, for practical purposes, at the present day, a dispute about it would be as idle as the dispute between Don Quixote and another madman about Queen Made-sima's chastity. But though, in 1819, the Keiskamma was proclaimed the boundary, the Kafirs still occupied the lands between that River and the Fish River, which were called the Ceded

Territory. In 1929, Maquomo was expelled from the Kat River, where the Hottentot Settlement now is ; more lately, further expulsions took place in the same neighbourhood, and I have what I deem the best authority for thinking that these transactions, though they might not justify, certainly produced the war of 1834. Are the Kafirs changed ? Have they decreased in numbers ? Are they worse armed ? Have they at length lost, what the uncivilized man loses last, — their love of their lands ? Can you now do without a war what produced a war in 1834 ? Sir, if any persons can maintain this, those persons are not the speakers at the late Frontier meetings. While saying and doing everything apparently calculated to bring on a war, they represent at the same time the powers of the Kafirs as most formidable, and tell Your Excellency that you have not troops to meet them. If I could suppose these gentlemen to be playing a game, I could understand them. By exaggerating the depredations of the Kafirs, and the designs of the Kafirs, and the powers of the Kafirs, a state of excitement is produced which must keep continually upon the Eastern Frontier a large military expenditure. But I should not regard such policy as an honest policy ; and I should therefore be slow to ascribe it to any individual, a hesitation which one of the late speakers did not feel in regard to Graham's Town, which he exhorted to forsake the flesh pots of Egypt, and take its eyes off the military chest and the mission chest. I am not to attribute motives. But I am to say this, that persons who call upon Your Excellency to take decided measures, and tell you, in the same breath, that you have not force enough to meet the enemy which those decided measures will provoke, do not, as it appears, to me, materially assist Your Excellency in the management of your Frontier policy. Sir, I have said almost all that it occurs to me to say upon this subject. I have spoken freely, as was my duty but I hope without offence. The remonstrances of our Frontier Colonists are not unheard. In one of their resolutions they deplore a want of education and literature, which has prevented their rights from being properly advocated. I doubt whether any class of people enjoy, in a higher degree of development, the faculty of

utterance, or contrive to make their complaints be heard more clearly, than her Majesty's subjects upon the Eastern Frontier of this Colony. The extension of the Colony in that direction is a cherished notion. But let those who cherish it reflect how each advance of boundary has brought us into contact with new neighbours, not less annoying than the old ; how, with Hottentot's Holland as our limit, we had plunderers beyond ; how it was the same with Gamtoos, and with the Fish River ; and let them consider whether, beyond the Keiskamma, or the Kei, we should not still find plunderers ready to create, by their depredations, the assumed necessity of another movement. I admit that the Fish River is a worse natural boundary than the Keiskamma. But if you conceive of the necessity of a war, and of the certainty that all the turbulence of Kafirland would, after that war, be found raging upon the other side of your new Frontier, you will doubt whether the moral disadvantages would not outweigh the physical advantages of the Keiskamma as compared with the Fish. And if I further say, that you could not now, morally speaking, justify such a measure of expulsion or extension, let it not be thought that I am run away with by a false philanthropy, or have formed a romantic estimate of the Kafir character. For myself, Sir, I am bound to say, that I have formed a very humble estimate of the Kafir character. I do not, in these times, look for moral miracles, any more than physical. It were to disparage Christianity and civilization to believe, as some amiable people have believed, that any tribe or nation to whom the blessings of both are comparatively unknown, could exhibit a moral character to be contemplated with pleasure. I believe that both Kafirs and Colonists are, to no small extent, the creatures of the circumstances by which they are surrounded ; and I therefore consider that, placed as this Colony is, it is by Christianising and civilizing the Kafirs, by religiously respecting our own engagements, by a judicious admixture of firmness and forbearance, reward and punishment, by encouraging the well disposed, and strengthening their hands against the mischievous, and by gradually cultivating amongst them the notion of moral obligation, that it is by such things more than by Commandos,

more than by seizing land, more than by military force, that the ultimate safety of the Frontier farmers is to be secured. I believe that these are sentiments in which the wisest and best men on the Frontier will concur. But there seems to be a small knot of men there who will be prepared to treat such sentiments with scorn. I dislike general insinuations. I name a man. Sir, I have been shocked by sentiments which Mr. Bowker, upon two occasions, has not been ashamed to utter. Can we forget his famous springbok speech? The man had been reading Tom Carlyle, and, not understanding that writer's grotesque Germanic manner of torturing common places into paradoxes, he thinks that he also has a fine thing to say, and out he comes with an elaborated passage which contains a principle that, reduced to action, would produce atrocities in comparison with which all that Alva ever did in the Netherlands, all that Dundee ever did in Scotland, all that Pizarro ever did in Peru, would be but merciful. "We have seen the graceful springbok," he says (I am conscious that I forget the eloquence, but I recollect the sentiment), "vanish before the useful sheep, and I, who like the picturesque, might almost regret the change; but that the savage Kafir should be made to sink before, and thus leave room for, the industrious European, could occasion me no feeling except pleasure." Now this profound contempt of colour, and lofty pride of caste, contains within it the concentrated essence and active principle of all the tyranny and oppression which white has ever exercised over black. Mr. Bowker, however, is not alone. A member of the British House of Commons, in one of the New Zealand debates, has lately said that the brown man is destined everywhere to disappear before the white man, and that such is the law of nature. It is too true that an induction of historical instances would seem to justify this theory. The history of colonization is the record of the dark man's disappearance. "But," to use Lord Plunket's well known language, "history unenlightened by philosophy is no better than an old almanac." And while it is indisputable that the contact of civilization of a certain grade with men uncivilized, has been, and must always be, destruction to the latter, it is yet to be tried whether civilization of a

higher order, civilization in comparison with which the so-called civilization of former times was itself uncivilized, is not destined to reverse the previous process, and to prove that the tendency of true civilization is not to destroy but to preserve ; and, surely, if this problem still waits for its solution, by no nation so fitly as by England can this great experiment be made. Sir, I have spoken much more than I anticipated. If I have spoken warmly, I have merely warmed with the subject, but not with individuals. I say once again, that I admit the existence of serious evils on the Frontier, and sympathize with those who suffer them. But I must still believe that however bad things may be, they are in a course of progress to what is better, and not to what is worse ; that what are sometimes prescribed as cures would but aggravate the disease ; that the present policy is, in its great principles, the best policy for our people. My advice, therefore, here and elsewhere, to Your Excellency is, to avoid extremities as long as you can properly avoid them ; to bear in mind that all improvement is necessarily the work of time ; to give your policy a fair and full trial, and not to be discouraged because it cannot achieve impossibilities ; but at the same time to cause the chiefs to understand that forbearance has, after all, its limits, that bad faith will in the end surely meet its punishment, and that you will know how to act if, at length, they force the alternative to be, whether they are to behave themselves or be destroyed.

ON THE ADMINISTRATION OF JUSTICE.

DRAFT COMMITTEE REPORT DRAWN BY MR. PORTER
AND SUBMITTED BY HIM TO THE COUNCIL.

[*Legislative Council, November 13, 1845.*]

MR. EBDEN :—With Your Excellency's permission I would suggest, in order that Your Excellency, the Council, and the public

may be in possession of the views of those members of the committee who differed from the report read, that my hon. and learned friend, the Attorney-General, should now read the report agreed to by the minority.

ATTORNEY-GENERAL :—If Your Excellency and the Council have no objection, I have none. I may mention that at the last meeting of committee the hon. secretary laid on the table and moved the adoption of the report just read ; in amendment whereof, I moved that the following report should be adopted :—

“In the discharge of the duty entrusted to them, your committee proceeded to the examination of such witnesses as were deemed most likely to afford useful information ; and the minutes of the evidence taken, with an appendix containing much additional matter, are submitted with this report. Upon a reference to those annexures, it will be seen that your committee have examined the three judges of the Supreme Court, six gentlemen who hold, or have held, the office of resident magistrate, one clerk of the peace, two advocates of the Supreme Court, and nine gentlemen engaged in mercantile or professional pursuits ; and they have also had before them a large number official or other returns connected with the criminal and civil business of the Colony.

“As your committee, in stating with as much succinctness as the subject will admit the conclusions at which they have arrived, will not feel themselves called upon to discuss or advert to the opinions of any particular witness by whom their inquiry has been assisted, they desire in this place to record their sense of the value and importance of much of the evidence obtained, and to recommend the whole of it to deliberate and dispassionate consideration.

“The principles upon which all legislation regarding the administration of justice ought to be based, seem tolerably clear. It may be assumed, that every sound judicial system should aim at three great ends :—first, so to compose the courts of justice that what they administer as justice shall really be such ; secondly, so as to place the seats of justice, that justice shall, as much as may be, be brought home to the inhabitants ; and, thirdly, so to fix the cost of justice, that, upon the one hand, individuals shall not, by

fear of expense, be deterred from seeking it ; and upon the other hand, that a judicial establishment, rendered unexpensive to individuals, shall not absorb an undue proportion of the general revenue. Of these great ends, your committee are disposed to regard the first as greatest. But none of them can, with propriety, be pursued to the neglect of any other of them ; and the first, notwithstanding its importance, must, to some extent, be modified by the other two. Viewing, then, the present judicial system of the Colony with reference to its adaptation to secure, in just proportion, the distinct and often inconsistent ends enumerated, your committee are of opinion, that while it is susceptible of improvement, its fundamental principles ought to be preserved. The charge incurred for the judicial establishment unquestionably forms a very large item in the expenditure of the Colony. But when we take into consideration the extent of our territory, and the thinness of our population, together with the fact that no part of the expense in question is, or in all probability for some time to come can be, provided for by local assessment, it will not appear surprising that the burden imposed upon the general revenue should be heavy. It is presumed that no one who duly estimates the importance of an efficient administration of justice, and the causes which, in this Colony, conspire to make such an administration of justice expensive, will be disposed to reduce, as disproportionate, the amount now devoted to that object. It appears to your committee that your endeavours should be directed, not to lessen the annual charge of the judicial establishment, but to devise, if possible, the means of making that establishment more efficient.

“ Entertaining views generally favourable to the present system in its fundamental principles, your committee are indisposed towards the adoption of any extensive alterations of which the expediency may reasonably be doubted. Believing that few administrative questions are more difficult than those which relate to the constitution, distribution, and gradation of courts, your committee are of opinion that no organic changes regarding such subjects should be made in a system which has been long tried, and which is not unpopular, except after the most cautious enquiry, and upon the

clearest reason. Upon the other hand, it will be the duty of the Council to take care that no proved abuse shall be permitted to continue, and that all evident improvements shall be carried into effect.

“Your committee will now proceed to arrange under separate heads the several matters upon which they deem it proper to report ; and in so doing they propose to advert, first, to the constitution, distribution, and jurisdiction of the superior and inferior courts ; secondly, to the system for the prosecution of crime in those courts respectively ; thirdly, to the mode of executing the civil and criminal process of those several courts ; and lastly, to the important subject of police. In pursuing this order, your committee believe that all remarks and suggestions which they have to offer to the Council, save those relating to trial by jury in civil cases, will be not inconveniently arranged ; and in concluding this report, they will separately advert to that important subject.

“ Supreme Court.

“In the opinion of your committee the present constitution of the Supreme Court should remain unchanged. They deem a court composed of three judges to be better, at least in a Colony like this, than a court composed of any lesser number ; and, without adverting to the peculiar circumstances which have limited the Supreme Courts of a few Colonies to two judges, and those of a greater number to one judge, your committee are not prepared to recommend any alteration which would reduce the number of judges now forming our Supreme Court.

“Two projects connected with the point now in question have been considered by your committee ; one, that of withdrawing a judge from the court at Cape Town, in order to form a separate but subordinate court at Graham’s Town ; and the other, that of adding two to the number of our judges, so as to make five in all ; and then leaving the chief justice to be permanent in Cape Town, to divide the Colony into five districts, and place the four puisne judges respectively in Worcester, George, Graham’s Town, and Graaff-Reinet.

“A full discussion of these projects, and of the several reasons advanced in their support, would greatly, and in the opinion of your committee, unnecessarily, swell out this report. That discussion may, with propriety and advantage, be reserved for council. But some brief reference to the grounds upon which your committee have been led to withhold their assent from both the projects mentioned seems to be demanded, as well by the nature of the projects themselves, as by the respect for the arguments and authority of those by whom they are respectively supported.

“With regard to the first proposal, there is no difference of opinion in the committee. The members are unanimous in thinking that no plan has been suggested which would justify the erection of a separate court at Graham’s Town by the means proposed.

“The question is not the naked one, whether a separate court there would or would not be a desirable thing. Provided the court were an efficient one, it may at once be admitted that, considered in itself and without regard to absolute expense and other claims, it would be a desirable thing. But the question simply is, whether in order to create such a court as that of one judge in Graham’s Town, we should leave such a court as that of two judges in Cape Town. Your committee are of opinion that such a proceeding would be most unwise. It would reduce inconsiderably, if at all, any of the present expenses, and would certainly entail some expenses wholly novel. But above all, it would leave the courts at either end of the Colony so constituted that the public confidence in the efficient administration of justice must almost necessarily be shaken. The reasons for this opinion might easily be expanded, and enforced; but since, as already observed, no difference of opinion upon the point exists in your committee, it is deemed needless to enter more minutely into the question. The project which is wholly distinct, of creating a new judge at Graham’s Town, leaving the constitution of the Supreme Court unaltered, will be adverted to hereafter.

“The plan of dividing the Colony into five districts, and placing a judge in each, is one which has been strongly supported in committee. It has been so supported chiefly upon the ground, as your

committee consider, that it would considerably shorten the delay before trial in all cases, criminal and civil, and that it would remove great and daily increasing difficulties connected with the means of transport for the judges upon their present circuits. That these things would be very advantageous can admit of no doubt. The sooner a man is tried (provided he have had sufficient time to prepare for his trial) the better ; since, if innocent, he is the sooner liberated, and, if guilty, the sooner punished. In the same manner it may readily be shown that no avoidable delay should take place in the determination of civil cases, in which delay always leads to expense and often to injustice. And in regard to the transport of judges on circuit, your committee acknowledge the possibility that if each of five local judges were to perform the circuit of his own district, and no more, some arrangements might be made respecting the number and supply of the necessary wagons and horses, which would be both cheaper and more convenient than any system which can be devised for conveying the judges, with a due attention to their comfort, over so long a circuit as that of the entire Colony.

“But neither these nor any other advantages which have been suggested, have satisfied your committee that the public welfare, which is inseparably bound up with an intelligent, impartial, and uniform administration of law, would be consulted by breaking up the Supreme Court for the purpose of substituting five separate judges, deciding separately in five separate places, three of those places being remote villages, in which there is not, nor is likely soon to be, a public press, or a public opinion, or professional aid.

“Your committee are aware that two safeguards against the mistakes or misconduct of the local judge were meant to be provided ; one, that he should try no question of fact without the assistance of a jury ; and the other, that three out of the five judges should assemble once a year in Cape Town, for the hearing of new trial motions and appeals. Under such circumstances, it is supposed that the local judge contemplated would be precisely in the situation of the existing single judge on circuit, except as to that which would give him an advantage, namely, the influence and assistance of jury trial in civil cases.

“Believing that trial by jury in civil cases would not tend to improve the administration of justice if generally adopted in such courts as those proposed, your committee do not regard its introduction there as any recommendation. They are of opinion, that such courts have no peculiar fitness for jury trial in civil cases, but rather the reverse. They consider that whenever trial by jury in civil cases shall be introduced into the country districts, it will, at least, in the first instance, be most fitly resorted to in circuit rather than in strictly local courts; because a stranger judge will be less likely either to overrule or be overruled by the members of the jury, than a person always resident upon the spot, whose strength or weakness all his neighbours know, and because in case of a new trial granted by the Supreme Court, upon the ground that the jury have failed to discharge their functions rightly, that new trial will, in all likelihood, be had before a different judge from him who presided at the first trial, and whose report of the proceedings may have led the court above to set aside the verdict. For such reasons your committee, instead of considering that the contemplated courts as compared with circuit courts present any peculiar facilities for the introduction of trial by jury in civil cases, are disposed to think that the converse is the fact, and since they do not believe, as will be hereafter stated, that even in the circuit courts trial by jury in civil cases can yet be fitly introduced, they would regard the proposal to establish it in the district courts contemplated, as calculated rather to increase than to compensate for any defects under which these courts might labour.

“Your committee would also observe, that whenever trial by jury in civil cases shall be introduced in any part of the Colony, the principles of our law, and the nature of our pleading, will require in every instance the decision of a previous question, viz., whether or not any, and, if so, what questions in the particular case before the court are proper to be tried by a jury? and that, where the decision of this question, always one of delicacy, must rest with a single judge, who will be liable to the suspicion of either unduly grasping at jurisdiction, or of getting rid unduly of individual responsibility, it will necessarily become peculiarly delicate.

“Viewing, therefore, the courts referred to as they would exist without trial by jury in civil cases, your committee are compelled to regard them as a retrograde movement in the administration of justice, and to state their impression, that the public in general would view such a change in our present system with well-founded apprehension.

“It is conceived that, in their practical operation, such local courts would differ widely, and for the worse, from the existing circuit courts. Appeals from the circuit courts now come on for argument immediately after the conclusion of the circuit. Appeals from the local courts may, upon the system proposed, lie over for a year. The circuit courts will, in general, furnish an inducement for the attendance of something like a bar. The business before the local courts, or most of them, could never furnish any such inducement. In cases of difficulty evidence can now be taken on circuit, and the case then removed for argument before the full court. No such beneficial practice as this could obtain in the local courts referred to. The circuit judge is now enabled to keep up or increase his professional knowledge, by the discussions of the bar, and by conference with his brethren. It is conceived that annual re-unions of three out of the local judges would not have the effect of preventing those functionaries from gradually losing whatever law they might originally have possessed.

“But if the circuit courts, as they stand, have advantages which the suggested local courts would not possess, the constitution of the Supreme Court, as it now exists, would by the establishment of those local courts, be wholly changed. It is intended that it should be a court of appeal from the local courts, and nothing more. The Supreme Court is now a court before which all cases may be brought in the first instance. If the parties agree, all cases brought in the Supreme Court, no matter from what part of the Colony, may be there determined. If the question be one merely of law, the case can, by either party, be always retained there.

“If facts be disputed, and the witnesses distant, so that they may more readily be heard elsewhere, the case is removed to the most convenient circuit court, to come back, if need be, to the supreme

for further argument, and final determination. Motions in bankruptcy, provisional cases, special verdicts in criminal cases, and matters of a like nature are now decided in Cape Town by three judges, with the assistance of a bar, in the presence of a public at least comparatively intelligent, and under the observation of a vigilant press. Your committee conceive that an annual meeting of three out of the five suggested judges, for the purpose merely of hearing appeals from judgments separately pronounced by those judges, would be a very indifferent substitute for the present Supreme Court. A court of appeal is doubtless necessary. But no court of appeal, however competent, can remedy half the mischief which may be done by defective courts of first instance. Had the suggested system presented anything that could be deemed to be counterbalancing advantages, your committee, while admitting its inconveniences, would have nevertheless embraced it. But they are unable to discern any such advantages.

“If viewed in relation to expense, it may safely be asserted that the suggested system, giving it credit for every saving that it could possibly effect, would, upon the supposition of but two circuits in the year through his district by each local judge, cost more than the present system at the present rate of transport. And, indeed without such circuits the expense would be greater than with them to say nothing of the great hardship and inconvenience to which all witnessess would be subjected by being compelled to resort to the distant seat of the local judge, instead of to their district town.

“It is maintained that the present mode of obtaining transport cannot continue, and that the judges must be conveyed by contract. Your committee are not in possession of the evidence upon which this allegation is founded. But assuming for the sake of argument that the system of contract must be resorted to, and that the result would be a considerable increase in the expense of transport, your committee do not see why the greater distance to be performed by the five suggested judges in their circuit should, by contract, cost much less than the transport of the present circuit judge. It remains to be proved that one wagon only would be demanded by the district judge, as well as that if one wagon be sufficient for him,

one wagon would not be sufficient for the circuit judge, now that fresh supplies may be had in so many towns and villages throughout the Colony.

"Your committee are disposed to doubt whether any accurate estimate of the comparative expense of the present and proposed system can now be framed. It is needless to remark that in comparing the expense of the two systems, all reductions equally competent to both must be thrown out of the calculation. It is only upon the items necessarily peculiar to each, that the relative cost can be determined. And your committee feel some confidence that, upon an accurate examination of the present system of a Supreme Court of three judges, and two circuits in the year, with the proposed system of five judges, with their establishments, performing two circuits in the year, it will be found that the latter will be the more expensive.

"For what objects, then, should a certain, and, as your committee believe, a considerable, additional charge be placed upon the public revenue, and all the cases now decided in the first instance by three judges be declared in the first instance by but one?

"These objects have been already stated. That they are desirable objects your committee have admitted. But that they are of paramount importance your committee cannot perceive, and in reference to one of them, namely, speedier trial of criminal and civil cases, they can perceive as little how the suggested system could be expected to accomplish it, unless at an expense which would still more increase the comparative cost of the proposed system.

"With two circuits in the year, the average detention of prisoners before trial in the circuit courts may be stated to be about 120 days. Two circuits in the year through the district of the local judge would give the same average detention in every place except his place of residence. Upon this supposition nothing is gained except in reference to prisoners at that place. In order to shorten the detention in the other places, the judge must either cause the prisoners and witnesses to be brought to his residence, or he must go circuit more frequently than twice a year, and in either way much additional expense must be incurred. If a sense of what is due to

untried men requires that we should incur that additional expense, let it be incurred. But when it is remembered that in England there are but two circuits in the year to try men committed by magistrates, who are not always stipendiary, and men whose cases no disinterested and responsible public prosecutor examines, it will be admitted that the practice in this Colony cannot be justly deemed regardless of what is due to be the liberty of the subject. No man can be committed for trial in this Colony except upon evidence that satisfies a salaried magistrate, whose duty it is to understand the law and apply the evidence. As soon as any man is committed, it is the duty of the Attorney-General to consider the evidence taken ; and should it appear insufficient, to order the man to be discharged. And, finally, twice every year there is a general gaol delivery. Your committee cannot admit that, under such circumstances, it is necessary to break up the Supreme Court, and to incur an additional expense, in order to have such general gaol deliveries oftener than twice a year.

“Your committee are disposed to think that, considering the paucity of criminal cases in this Colony, and particularly in the country districts, criminal sessions may possibly be held too frequently. Except in so far as by the trial and punishment of offenders, the minds of the mass are educated into a state in which, anterior to all reasoning about consequences, crime comes, by a sort of moral instinct, to be regarded as a thing not to be committed, trials and punishments entail an almost useless amount of suffering and expense. The trial, therefore, as well as the punishment, should be public, and should be witnessed by the public. When solemn sittings are held at intervals, during which such a number of cases has arisen as will attract an audience and fix attention, salutary lessons may be given, which could not be inculcated if cases were to be disposed of pretty much as they come in, in the presence merely of the parties interested, the officers of the court, and such loungers as might straggle in.

“Your committee do not advocate long imprisonment previous to trial. But it is only to innocent men, or, to speak more properly, to men who are finally acquitted, that such previous imprisonment

is really a hardship. The returns before the committee go to show that in this Colony the number of acquittals amounts to less than 9 per cent of the committals. By parliamentary returns for 1834 and 1835, which are all that your committee have had an opportunity of consulting, it appears that the committals in England and Wales in those years amounted to 43,182, and that the acquittals were 12,412, being rather more than $28\frac{1}{2}$ per cent of the committals. This difference, arising, as your committee conceive, from the exercise of the office of public prosecutor, should not be neglected when we are reasoning about the evils of confinement before trial.

“Your committee, therefore, are of opinion that the Supreme Court should not be broken up in the manner which has been proposed, and that two circuits in the year should continue to be made as usual.

“Additional Judge at Graham’s Town.

“The general question regarding the creation of a separate but subordinate judge in Graham’s Town, has been fully considered by your committee. Assuming his salary to be equal to that of a puisne judge in Cape Town, the establishment of a court of the most economical description would necessarily entail a considerable expense. Your committee believe that the amount which would be required may be more beneficially applied in adding to the existing magistracy. With two circuits in the year to the eastern districts, and two posts in the week from thence to Cape Town, where the Supreme Court sits, your committee conceive that the reasonable necessities of the inhabitants of Albany are sufficiently consulted. In regard to the eastern districts other than Albany, your committee have reason to conclude that whether the court is placed at Graham’s Town or Cape Town is to them a matter of indifference. But that the non-local court to which they have recourse, should be composed of three judges or of one, is by no means a matter of indifference. Your committee, while they have no doubt that the inhabitants of Albany would gladly possess a court of equal efficiency with the present Supreme Court, are by no means certain that

the general feeling amongst them would be favourable to the erection of a court consisting of but one judge, to whom, and whom only, they could, in the first instance, look for justice. Related as the Supreme and Circuit Courts at present are, suitors can, when so disposed, combine, in a great degree, the cheapness of a local inquiry into facts with the advantage of a more remote but, at the same time, a more satisfactory determination of the law. Your committee are disposed to question whether the inhabitants of Albany would exchange these advantages for a single judge, even with an appeal to Cape Town. But were this otherwise, your committee could not recommend that so large an addition to the charge of administering justice should be made for the sake of placing any one frontier district, however important, in a different position from that of every other.

“ Resident Magistrates’ Courts.”

“Your committee recommend that a considerable increase should be made to the number of the resident magistrates. Upon the paramount importance, or, to speak more properly, the urgent necessity, of such an increase, your committee believe that all are cordially agreed. It may be safely said that additional magistrates are one of the chiefest wants of the Colony. Important districts, and large numbers of people, lie upwards of one hundred miles from any magistrate. The extreme remoteness of the existing seats of justice induces very serious social evils; questions between master and servant are left unsettled; crimes are compounded in some instances; in others the supposed criminals are summarily subjected by the injured parties to severe corporal punishment; in a greater number complete impunity is enjoyed by criminals who are well known to be such; and the ultimate effect is a general vitiation of the moral sentiments of our distant population, leading, in its turn, to the commission of fresh crimes. To furnish the means of supplying new magistrates without impairing by any injudicious retrenchment the efficiency of the existing administration of justice, has been an object to which your committee have directed much of their attention.

“It appears to your committee that means may be found of adding

to the number of existing magistrates, so as to make their whole number thirty, without sensibly, if at all, diminishing the efficiency of any part of the present system. The sites at which the new magistracies should be established seem to be pretty generally agreed upon, and will not be difficult to determine.

“ In reference to the convenience of the inhabitants and inefficiency of the magistrates, it has occurred to your committee to suggest that a complete revision of the limits now assigned to the several magistracies in the Colony, for the purpose of making the position of each magistrate as central as possible, would probably be attended with very beneficial consequences.

“ Your committee are aware that none of the purely fiscal arrangements of the Colony come within the scope of their inquiry, but they submit, for their consideration in the proper quarter, that if every such district were separated from the rest, as well for financial as magisterial purposes, the convenience of the inhabitants would be very much promoted. Your committee do not see any sufficient reason which should prevent the Government from equalising, as vacancies occur, the salaries and duties of all magistrates, or why, in other words, the offices of magistrate and civil commissioner should not be universally combined. The slight multiplication of public accountants, which would be the consequence of such a change, ought not, your committee think, to stand in the way of an improvement which would relieve great numbers of our rural population who desire to pay transfer dues or land rent, from the necessity of undertaking, with one public functionary in their immediate neighbourhood, long, harassing and expensive journeys to another public functionary placed at a distance.

“ Your committee are of opinion, that the time has come when it behoves the Colonial Government to take upon itself the maintenance of the four magistrates hitherto paid by Her Majesty's Government, namely, the magistrates of Wynberg, the Paarl, Malmesbury, and Caledon. While it is true that a principal part of the late slave population is still to be found in the vicinity of the places above enumerated, it has not appeared to your committee that that circumstance can justify a call upon the Home Government

to provide longer for magistrates whose special services were in their nature temporary, who have already been supported for nearly seven years, and whose duties are not distinguishable from those of resident magistrates in general.

“Jurisdiction of the Resident Magistrates’ Courts.

“Your Committee are not prepared to recommend that the jurisdiction of the courts of resident magistrates should be largely increased.

A purely summary trial has certainly many obvious advantages. It saves the expense of supporting the prisoner previous to conviction ; it saves the expense of the double journey of witnesses ; it strikes the minds of the people by the suddenness with which the punishment may be made to overtake the crime. But your committee are disposed to think that these advantages could not, in practice, be altogether realized by a large extension of the summary jurisdiction, or that, if realized, it must be by the sacrifice of still greater advantages. A prisoner brought in immediately upon his apprehension, may not be prepared to take his trial ; and if, in such a case, the magistrate should, as soon as he had evidence which could warrant a committal for trial, instead of committing for trial, find the prisoner guilty, and pronounce a serious sentence, say two years’ imprisonment, it is to be feared that mischiefs might ensue, against which no system of appeal or supervision could effectually guard. Upon the other hand, if the commitment and the trial are still to be distinct proceedings, the double journey of the witnesses would continue to be necessary ; and from the same causes the other anticipated advantages would likewise be diminished. To allow the witnesses to depose and then retire to their homes, leaving the prosecutor or prisoner to bring other evidence afterwards, but before judgment, would let in another serious inconvenience : for no trial can, in general, be satisfactory in which there is not, during its progress, a constant power of recalling and confronting witnesses. A summary jurisdiction, by which the double journey of the witnesses is dispensed with, appears to your committee to involve difficulties of so grave a nature, that

it can only be allowed under two conditions ; one, that the cases submitted to it shall be of the simplest class ; and the other, that the punishments to be inflicted under it shall be so limited as to make the consequences of an error of judgment comparatively unimportant.

“ Influenced by such considerations, your committee are not prepared to recommend that the resident magistrates should have jurisdiction in any criminal cases other than those of which they can now take cognizance, nor that their power of punishment should exceed three months’ imprisonment. But such a moderate increase they conceive would be decidedly expedient. It would not, in fact, throw a much greater number of cases into the court of the resident magistrate than those on which he now adjudicates ; but it would enable him to pronounce, in some of those cases, a more fitting punishment, and also to discriminate between different degrees of guilt more strongly than he can do when, as at present, he can in no case imprison for a longer period than one month.

“ Assuming that the number of resident magistrates will be augmented, and their criminal jurisdiction increased, in the manner pointed out, it may become worthy of consideration whether means may not be devised for securing or promoting the legality, uniformity, and efficiency of their proceedings. For this purpose your committee are disposed to think that the several resident magistrates in the Colony (except, perhaps, those of Cape Town and Graham’s Town) should be called upon to transmit to some competent authority the record of every criminal case summarily disposed of by them, whether it shall have terminated in a conviction or an acquittal, and containing a statement of the charge, the evidence, and the judgment. This record it should be the duty of the authority referred to, to peruse, for the purpose of ascertaining whether any irregularity, or apparent error, had crept into the proceedings. Should such be found in any case where a conviction had been had, the convict should be pardoned, and where any acquittal seemed to have proceeded upon a wrong principle, such a representation might be made to the magistrate as would have the effect of preventing a recurrence of the mistake. In the same manner a certain degree of

uniformity in the sentences of the various magistrates might be expected gradually to arise from the influence of such a superintending authority as that which the committee have in view. That authority might be either the Attorney-General, or a separate officer who, like the Attorney-General, should be permanently resident in Cape Town. But your committee are of opinion that, should such surveillance be deemed by the Council to be salutary, it should be given to the judges of the Supreme Court ; a course which would, at once, secure the highest degree of qualification, and be attended with no expense.

“An extension of the civil jurisdiction of the resident magistrates is not open to the same or equal objections as an extension of the criminal. It is therefore recommended that the civil jurisdiction should be increased.

“The resident magistrate of Cape Town has, at present, jurisdiction in civil cases where the cause of action does not exceed twenty pounds in value. In the country districts the resident magistrates cannot decide cases involving an amount of more than ten pounds. Your committee are of opinion, that if any difference should exist between the jurisdiction in Cape Town and the jurisdiction in the country districts, the jurisdiction should be greater in the country than in town ; because, while the Supreme Court is always open to such suitors in Cape Town as cannot proceed before the resident magistrate, suitors in the country, whose cases the resident magistrate cannot hear, must wait for circuit. But your committee recommend that the jurisdiction of all resident magistrates should be equalised, and that they should (subject of course to the restrictions now by law provided, which prevent them from trying titles to lands or offices, or any cases in which their judgment could bind rights in future) be competent to adjudicate in every instance in which the sum or matter in dispute shall not exceed the amount or value of thirty pounds.

“Liquid documents,—by which are understood unconditional promises to pay money, or absolute acknowledgments of debt,—are in their nature such clear evidence of a claimant's right, that the law of this Colony, like that of most countries, gives to the holder of

them peculiar facilities for realizing their amount. Your committee were, at one time, of opinion that, in regard to such documents, the jurisdiction of the resident magistrates might with safety be increased to forty pounds, and that in all illiquid cases the limit of twenty pounds should be prescribed ; but as questions might occur regarding what were liquid and what illiquid cases, we have come to the conclusion that a general jurisdiction to the amount of thirty pounds should be bestowed.

Prosecution of Crime.

“Your committee are of opinion, that to provide, as our judicial system does, a responsible public prosecutor, is not merely sound as a principle of general application, but that, in practice, it has worked well in this Colony.

“If crime, as in some countries, must be prosecuted by the parties injured, it will, in many instances, be either prosecuted vindictively, or not prosecuted at all, to say nothing of the hardship of declaring that those who have for the most part already lost by the crime, shall come forward to prosecute the criminal, regardless of time, trouble, odium or expense. If crime, as in some other countries, can never be prosecuted but by the public prosecutor, that officer is invested with an arbitrary power which may be abused by incapacity or corruption. When the public prosecutor is required to examine every case, and prosecute or not as he sees cause, but, at the same time, the party injured is at liberty to proceed, after the public prosecutor has declined to do so,—both the evils which have been specified are avoided. And this is the system established in this Colony.

“Entertaining so favourable an opinion of the office of public prosecutor, your committee conceive that none of the powers or duties now belonging to it should be interfered with, and that it should continue to direct, as heretofore, all prosecutions before the colonial courts.

“The public prosecutor is, at present, represented in each district by the clerks of the peace. Your committee are of opinion that such officers are not an essential part of the system of public prose

cution ; that the duties performed by them are shown by the returns to be wholly incommensurate with the incurred expense ; that those duties may more cheaply, and as efficiently, be performed by other officers ; and that the clerks of the peace should be abolished. By this means a saving of £3,966 per annum would be effected, which would go far towards covering the expense of the new magistracies so much required.

“ If the principle of clerks of the peace in all seats of magistracy is to be maintained, your committee do not discern any practicable mode by which the means of paying any considerable number of new magistrates can be provided, without materially increasing the annual expense of the judicial system. Upon this supposition, you cannot create a new resident magistrate without creating a new clerk of the peace, and thus an obstacle of a nature almost, if not altogether, insurmountable is thrown in the way of the most eminent improvement of which the administration of justice in this Colony is susceptible. But if, on the other hand, it be found that the duties of new magistrates can be discharged without the assistance of such officers as clerks of the peace,—then the question arises, whether the duties of the present magistrates may not be charged with such aid ; and your committee are of opinion, that they can be so discharged ; and that the office of clerk of the peace may be discontinued without leading to diminished efficiency in any magistracy, new or old.

“ Your committee are of opinion, that the resident magistrate should himself receive the report of crimes, and take the preparatory examination. The intervention of an officer between the committing magistrate and the witnesses, appears to your committee to be, in a great degree, a useless form. Every magistrate who is competent to estimate the weight of the evidence, must be presumed to be competent to elicit it by the necessary questions. It is true that two investigating officers will, in general, if equally zealous and intelligent, investigate more thoroughly than one, and that by being relieved from the duty of conducting the whole investigation himself, the magistrate may be supposed to have his attention less distracted, and his judgment more unbiased. But it appears to

your committee that, in the face of a pressing necessity for as many magistrates as can be procured, to incur a heavy expense for the sake of such advantages as they have now alluded to, would be to refine too much, and sacrifice practical utility to systematic perfection.

“Your committee consider that there is nothing in the taking of a preparatory examination which it could be improper or incongruous for the magistrate to perform, and that the examination, when taken, may be transmitted to the Attorney-General's office by the magistrate as fitly as by the clerk of the peace.

“Another portion of what may be termed the court duty of the clerk of the peace, is to prosecute in summary cases. It is conceived that the interference of such a functionary with such cases is not required. By hearing the parties concerned, the magistrate will be able to attain a perfect knowledge of the case, and he does not seem to stand in need of assistance from any one in the character of advocate or agent.

“The remaining duties of the clerk of the peace which regard the administration of justice, are two ; one connected with the first stage of each criminal case, and the other with the last ; the first being to trace out the crime, the criminal, and the evidence against him, previous to the preparatory examination, and the second to conduct the case in the circuit court after the indictment.

“Your committee conceive that between these different duties, the one being that of a police officer, and the other that of an advocate, there is no natural connexion, and that their union in the same officer is not desirable. In all probability the person by whom one of them is performed with singular ability, will be, on that very account, deficient in the other. Your committee are of opinion, for this amongst other reasons, that those duties ought to be divided.

“In regard to the tracing of crime and criminals, this, being a police duty, should, in the opinion of your committee, be performed by police. An inspector of police, acting under the resident magistrate of the district, will, it is anticipated, be more competent to discharge the peculiar function now in question than officers charged with, and competent to, the other functions of the present clerks of the peace. Indeed, without such a head of police the clerks of the

peace could scarcely act efficiently while engaged in tracing crimes and criminals ; and with such a head of police, acting under the magistrate's orders, it appears to your committee that the clerks of the peace may themselves be dispensed with. The subject of police in the country districts will be afterwards adverted to under a separate head.

“The manner in which prosecutions in the circuit courts should be conducted after the abolition of the office of clerk of the peace, has been much considered by your committee ; and while the members are not in all respects unanimous in matter of detail, they are generally agreed upon the principle which it will be expedient to introduce. They are of opinion that by the employment of a circuit prosecutor—(one, or more than one, should it be found desirable)—whose head quarters should be Cape Town, and who should be, while there, in personal communication with the Attorney-General relative to the country cases to be tried, the duty in question may be efficiently performed. Whether the circuit prosecutor should be chosen out of the present clerks of the peace, and should receive a stated salary, and be debarred from other practice, or whether the office should be filled by an advocate willing to undertake the duty together with his private business, or whether, in order to prevent too many demands from being made upon the attention of one advocate, and to encourage, for public convenience, the attendance of at least two advocates on circuit, it would be advisable to arrange that the public prosecutor should be represented by different advocates in different towns,—all these are questions upon which it will be for the Council to decide. Your committee will, at present, only say that any one of the modes above suggested is, in their opinion, capable of working well. It may confidently be assumed that the prosecutor, or prosecutor's deputy, whoever he or they may be, will, in intelligence and legal knowledge, be superior to the average of clerks of the peace ; that in regard to the majority of cases personal communication with the department of public prosecutor will have imparted ample information as to the circumstances of the case ; and that in the rare instances in which, for the purposes of challenging jurors, a certain degree of purely local

knowledge is demanded, the necessary knowledge can always be obtained upon the spot. Your committee must also observe that as there is rarely minute local knowledge without some little local prejudice or prepossession, they do not deem it desirable as a general principle that the prosecutor who conducts the case in court should possess that minute knowledge.

“Should the recommendations of your committee, in regard to the office of the clerk of the peace, be carried into effect, the course which will be pursued with respect to the tracing and trying of criminals will, in its main features, be as follows. There will be the chief of the district police, who, besides directing his energies to the prevention of crime, will be bound to make every exertion when crime is committed to secure the perpetrators. Acting under the orders of the magistrate, and when practicable in conjunction with the field-cornet, he will cause the prisoner, with the necessary witnesses, and if possible none but the necessary witnesses, to be brought to the district town. Arrived there, the magistrate will proceed, should the case be one above his summary jurisdiction, to take a preparatory examination. When this shall have been completed and the prisoner committed for trial, the magistrate will transmit the depositions to the Attorney-General. Should this officer consider that the evidence is in any respect defective, he will communicate with the magistrate upon the subject, pointing out what is defective, and suggesting the best mode of supplying the deficiency. When the case is one which the public prosecutor feels it his duty to indict, he will, in due time, transmit the indictment to the magistrate, in order that it may be served upon the prisoner, and that the witnesses may be summoned. The manner in which such service and summoning are to be made will be referred to in another part of this report. In the meantime, the circuit prosecutor will have read and considered the depositions and communicated with the Attorney-General in regard to any difficulties which may be presented by the case. When the circuit prosecutor reaches the circuit town, the magistrate, through his clerk, will hand him, as a brief, a copy of the depositions, and the magistrate's clerk and the chief of police will confer with the circuit

prosecutor regarding any matter connected with any of the cases which may appear to any of the parties to be important. In court the circuit prosecutor will, as counsel, conduct the case. The duty of having the witnesses in readiness, and of afterwards paying their expenses, will be divided between the chief of police and magistrate's clerk. When the circuit has closed, or sooner if convenient, the circuit prosecutor will furnish to the Attorney-General's office a report of the cases tried, exhibiting the result of each, and offering such remarks upon any error which may have been committed, either in the preparation of the indictment or any other part of the getting up of the case, as may serve to improve the practice of the office.

"Your committee are of opinion that according to the system now described, the functions of the public prosecutor and those of the magistrate are in no way unconstitutionally blended ; that under it the magistrate cannot, in any just or even intelligible sense, be said to be under the control of the Attorney-General; and that, in so far as it tends to impose upon the magistrate an undivided responsibility for the state of his district in regard to the prevention and prosecution of crime, it is preferable to a system which divides that responsibility between the magistrate and the clerk of the peace, in proportions not clearly defined either by law or common opinion.

Grand Jury.

"The existing grand jury system in the Cape division may be regarded as a part of the present system of prosecution of crime. Your committee, without saying that this institution is necessarily mischievous, look upon it as a useless anomaly which ought to be abolished. It is calculated to do ill what the petit jury can do well. It presents no check upon the public prosecutor which the petit jury and an open trial would not more effectually present. It decides in secret upon evidence taken in secret, where there is neither judge to expound the law, nor machinery to bring out the facts, nor a public audience to witness their proceedings and judge their judgment. It has no sense of responsibility sufficient to control any prejudice or prepossession which may exist amongst the

members. It was introduced into this Colony from England, where its ancient function was that of public prosecutor, namely, to enquire into rumoured offences, and determine what parties should be proceeded against, and where, in all probability, it never would have been known had another official and responsible prosecutor been provided. It arose in the mother country long before the practice of commencing criminal cases by a preparatory examination before justices of the peace was known, and in the opinion of eminent authorities might well have sunk into disuse when that practice became universal, inasmuch as it then ceased to be, what it had been before, a preliminary inquest. It never existed in Scotland, where the officer of public prosecutor is established ; and has not been adopted in France, which borrowed from England her system of petit juries in criminal cases. It is found in the metropolis of the Colony, where abuse of the authority of the public prosecutor is least likely to pass unnoticed or uncensured ; and is not found in the country district, where there is no weight of public opinion to control the public prosecutor, and where, if there were such, the public prosecutor is too distant to regard it. It deprives the petit jury list of the Cape division of a number of gentlemen who would constitute its best members.

“Believing that the grand jury system should, for the sake of consistency, be either extended or abolished, your committee, for the reasons given, recommend its abolition.

Execution of Process.

“All summonses of the Supreme and Circuit Courts in civil and criminal cases, and all writs of execution in civil cases, are served and executed by the sheriff of the Colony, or his deputies.

“The sheriff receives a fixed salary, but his deputies in the country districts are paid by fees.

“By a return which has been obtained from the sheriff’s office, and which will be found amongst the proceedings of your committee, it will be seen that the amounts received by the deputy sheriffs vary considerably, and that, in the aggregate, they amount to £4,846 17s. 4d. per annum.

“Circumstanced as this Colony is, we must seek the means of providing for new officers by consolidating the duties, and so reducing the number, of the old.

“It may, therefore, become worthy of the consideration of His Excellency and the Council, whether the clerks of the resident magistrates, who are at present very poorly paid in the various districts, might not act as deputy sheriffs, receiving a fixed but increased salary, and paying over all fees into the treasury.

“In the performance of the duties of deputy sheriffs by the magistrates’ clerks, the police force already mentioned, and which will be more particularly adverted to under the next succeeding head of this report, might, perhaps, be made to afford efficient and comparatively speaking inexpensive aid.

“It appears, however, to your committee that no such change could be properly effected without relieving the sheriff of the Colony from his responsibility for persons whom he had ceased to appoint, and without a guarantee, on the part of Government, for the due performance by its officers of the duties to be imposed upon them. As the matter now referred to was not made the subject of any examination of witnesses in the course of our enquiry, and as your committee do not feel that they have sufficient information before them to entitle them to form any positive opinion, they wish to be understood as merely suggesting for further consideration the plan which has now been indicated.

“Your committee are of opinion that the duty of summoning jurors and witnesses in criminal cases should be discharged by the police of the district. By this means it is conceived that the work will be at least as efficiently performed as at present, and that a saving will thereby be effected, which will materially contribute to the support of the police force, without diverting its members from any of the duties more immediately belonging to them as constables and conservators of the peace.

Police in Country Districts.

“Your committee conceive that the presence of a small but intelligent police force in each cctry district would prove very useful.

“The constables should act under a head, to be called inspector, and the entire force should be placed under the orders of the resident magistrate.

“The number of policemen required would vary with the requirements of the various districts, but an average of four, including the inspector, would seem, at least in the first instance, to be as many as it would be expedient to appoint. Should it be found that a larger number was required, and the means of maintaining it exist, an addition could readily be made. The inspector and two constables should be mounted.

“It is conceived that competent inspectors could be found who would, providing and keeping their own horses, serve for £100 per annum. Constables might be had for £40 per annum. The inspector, it is believed, would provide and keep horses for such of these constables as were to be mounted for an annual allowance of £25 for each horse.

“If such a police were placed in each district, it might be worthy of consideration whether the number of field-cornets and assistant field-cornets might not be reduced with advantage to the public service.

“Your committee are of opinion that the inspector of police might also act as messenger of the magistrate’s court, so as to effect a saving, should no change be made by which the duties of messenger should be consolidated with those of deputy sheriff, and the whole be then performed by the resident magistrate’s clerk or by some other salaried officer.

Trial by Jury in Civil Cases.

“Your committee have now reached the last point to which, in the outset, they proposed to advert. It is one of great importance and acknowledged difficulty.

“The benefit of trial by jury in criminal cases is almost universally admitted. Your committee consider that it has in this Colony worked well. Cases very rarely occur here involving strong popular excitement amongst the classes of which the juries are composed, and, consequently, there are as rarely witnessed those

blind convictions and those equally blind acquittals which now and then in other countries have tended to bring trial by jury into disrepute amongst impartial men. It is believed that the instances in this Colony in which the presiding judge has seen cause to be dissatisfied with the finding of the jury have been very few indeed.

“The advantages of the system are not confined to the delivery of true verdicts. Its indirect influence is very beneficial. It may be admitted that a judge whose education has been directed to legal objects, whom long practice has taught the art of eliciting evidence and the mode of estimating its weight, is more likely to come to a right conclusion than an ordinary jurymen taken from his farm or his shop. But no judge, however able or upright, is likely to decide criminal cases so correctly as a number of such jurymen of opposite pursuits and habits of thinking, who are assisted by the professional views of the judge, but who at the same time can correct that tendency to become too technical which professional views occasionally exhibit, and who bring to the determination of the question “guilty or not guilty,” more sympathy with the sentiments of the society from which they are indifferently taken than could be secured in any other way. When to this are added the protection which, in general, the accused enjoys from trial by jury, the advantage of exercising the intellect and increasing the information of the jurors, and the importance of giving to our upper and middle classes themselves some knowledge of the laws which they are privileged to administer, it will not appear surprising that trial by jury should be popular in this Colony, and that an extension to civil cases of that mode of deciding questions of fact, should number many advocates.

“It might, at first sight, appear that if trial by jury in criminal cases be desirable, trial by jury in civil cases must be desirable too. It may be urged, and with truth, that the questions of fact occurring in the one class of cases are not in general more difficult than those occurring in the other, and that the consequences of error are, for the most part, more serious in the cases which we try by a jury than in those in which we try without it. But your committee, while favourable to the plan of introducing trial by

jury in civil cases, cautiously and as an experiment, are yet of opinion that its fitness for criminal cases does not necessarily prove its fitness for civil cases : and that to introduce it generally and at once throughout the whole Colony, might be productive of serious inconvenience, not to say of positive injustice.

“One very obvious difference between criminal and civil cases in regard to jury trial arises from the difference in the principles by which, in each case respectively, the finding should be governed. When the public prosecutor is plaintiff, and the prisoner is defendant, the law requires that the plaintiff should not have a finding in his favour so long as there exists a reasonable doubt of the defendant's guilt. In civil actions the rule is otherwise. There the plaintiff is entitled to a verdict upon the bare preponderance of proof, and cannot without injustice be put out of court upon a mere doubt, however reasonable, of the defendant's liability. If jurors in civil cases were always to find for the defendant when the evidence is in that state in which in a criminal case they would properly find for the prisoner, the consequences would be disastrous. Under these circumstances it is conceived that, in general, much less acumen is necessary to act as juror in criminal than in civil proceedings, since it is easier to see when evidence preponderates so overwhelmingly as to leave no reasonable doubt, than to see when it simply preponderates, and does no more. It certainly is difficult, in some cases, to define or determine what is a reasonable doubt. But in practice it is found that the same humane considerations which have led to the establishment of the rule itself govern the application of it also, and that in almost all cases of a difficult nature the jury relieve themselves from embarrassment by acquitting the accused.

“Another, and perhaps more important, distinction between criminal and civil cases in regard to jury trial in this Colony, arises from the smallness of our population, coupled with the difference which exists between the class of persons usually interested in criminal proceedings as contrasted with the class of persons usually interested in civil.

“For the most part prisoners are persons in the lower rank of

life. They are either unknown to, or unconnected with, the persons who compose the jury. The humanity of our jurymen is a safeguard, in every case, against undue convictions. But in most instances there is nothing in the social position of the accused to prevent a conviction when justice calls for it. If in case the ends of public justice shall not be fully secured by our colonial juries, it will not be by convictions of the innocent, but by acquittals of the guilty.

“With suitors in civil cases the matter would be very different. There are few places in this Colony in which it would be possible to empanel a jury to try any civil case of a certain importance, arising in the district, who had not more or less prejudged the question, or who did not stand in some relation to one or other of the parties inconsistent with complete indifference.

“It is true, indeed, that cases may be supposed in which the judge may be known to be on terms of intimacy with one or other of the parties. But when the judge is non-resident, as our circuit judges are, those cases must be very rare. And if any case do arise, the judge’s sense of undivided responsibility for his judgment, to say nothing of more exalted motives, is a great safeguard against favouritism. The judge, moreover, is constrained by a practice, which has become a principle, to give his reasons in open court. The jury, on the other hand, gives no reasons whatever ; and in the opinion of your committee, the necessity of stating in the presence of an audience, who have heard the evidence, the grounds upon which the judge rests his judgment, affords a security for right decisions of which it would be difficult to over-estimate the value.

“The time will probably come when trial by jury in civil cases may, with safety, be introduced into the circuit courts and country districts. But your committee are not prepared to recommend at present such a sweeping measure.

“It is in the Supreme Court that the experiment may most conveniently be tried. The number of the population of Cape Town and its neighbourhood, and the other securities for impartiality which there exist, appear to your committee to warrant the belief that jury trial in civil cases may be introduced in the Supreme Court with a reasonable prospect of success.

“Every disputed question ought to be tried by a jury upon the application of either party in all cases in which the court should be of opinion that the question in dispute was purely one of fact. Matter of law should be reserved for the decision of the court. Mixed questions of law and fact should, if possible, be separated so as to send the fact to the jury and leave the law for the court.

“The nature of our jurisprudence, which does not divide law and equity into separate systems, much less administer law and equity in separate courts,—and the nature of our pleading, which does not necessarily end as pleading at common law in England for jury purposes always does, namely, in the extrication of some fact or facts directly asserted on the one side and directly denied upon the other, will render some provisions necessary for determining clearly the question to be tried.

“For this purpose your committee consider that the parties under the direction of the court should settle between them the issues for the jury.

“The jury list in regard to civil suits should comprise only such persons as were by education and intelligence presumed to be qualified to act; and the principles upon which special juries are struck in England should, in all cases, be applied.

“Your committee conceive that, under the circumstances now set forth, no evil can in any case be reasonably apprehended from the introduction of trial in civil cases; and they are of opinion that in a certain class of cases the introduction of that form of trial would be of public benefit. If found unserviceable, the measure may be abandoned. Should it work well in Cape Town, it may gradually be extended to other parts of the Colony.

“Your committee deem it to be their duty to recommend, in regard to trial by jury in civil cases, a cautious and gradual rather than a sudden and general change. In criminal cases they consider juries to be wholly indispensable, and they regard with just admiration that noble form of trial. But in reference to jury trial in civil cases, they cannot but recollect that great difference of practice and opinion prevails in Europe; that in France, while trial by jury in criminal cases has existed since the revolution, it

has never been in civil cases ; that the great majority of those numerous continental legislators and jurists who have of late years discussed the question, are adverse to the system ; that in Scotland the policy of the Act of 1815, which, for the first time, established a rather restricted system of jury trial in civil cases, is still much questioned ; that in England the opinions of jurists are much divided, and that there seems to be an increasing disposition on the part of suitors there to resort to those courts which try without a jury, rather than those in which jury trial prevails."

ON THE DUTCH REFORMED CHURCH.

[*Legislative Council, November 24, 1845.*]

THE ATTORNEY-GENERAL said that the Church Ordinance, which he had prepared under the directions of His Excellency's predecessor, had appeared, and justly appeared, to Her Majesty's Government to involve some large questions. They had accordingly called for a full report upon the principles and policy of the measure, either from the Governor, or the Attorney-General of the Cape. Being commanded by his Excellency, he (the Attorney-General), had prepared as complete a report as he was able, which had been transmitted to the Secretary of State. The last communication received from His Lordship by His Excellency stated that if the 5th Section were altered so as to vest the appointment of ministers of the Dutch Reformed Church in Her Majesty directly, instead of in the Governor, the Queen would be advised to allow the Ordinance. The matter was one rather of form than substance, and the present Bill went to make the change required by Lord Stanley. He moved the second reading.

ON THE WILLS ATTESTATION ORDINANCE.

[*Legislative Council, November 24, 1845.*]

The ATTORNEY-GENERAL said that it would be unnecessary to detain the Council long upon this Bill. It would be recollected that he had brought in a Bill in 1843 for retrospectively establishing the validity of certain wills and powers of attorney not duly witnessed by seven witnesses, and for settling the mode of attestation which should apply after the 1st of January, 1844. Her Majesty's Government had disapproved of the retrospective section, and in Lord Stanley's Dispatch to His Excellency of the 18th October, 1844, His Lordship said :—" You will therefore propose to the Legislative Council of the Cape of Good Hope the repeal of the first clause. If that proposal should not be accepted, it will become my unwelcome duty to advise Her Majesty to disallow the Ordinance altogether, although I entirely concur in the wisdom of the prospective enactment it contains." In obedience to this direction, the Ordinance No. 11, of 1845, was introduced repealing the first section. The Secretary of State, however, had again intimated his opinion that the law even thus altered, was still, in certain cases, retrospective ; and he has directed the present mode to be adopted. That mode was a very convenient one, and he, the (Attorney-General) advised the Council to pass the Bill. In a memorandum addressed to His Excellency, he had explained more at length his views upon the law as it now stands, and he would not trouble the Council further. He moved that the Bill be read a second time.

ON THE JUDICIAL SYSTEM.

[*Legislative Council, December 15, 1845.*]

THE ATTORNEY-GENERAL said :—May it please Your Excellency—I rise for the purpose of moving a series of resolutions by way of amendment to the resolutions proposed at our last meeting by my hon. friend, the Secretary to Government. In order to put Your Excellency and the Council in possession of the principles upon which my resolutions are based, it will be necessary, I fear, that I should occupy not a little of your time. Under these circumstances I rely upon experiencing this day, what I have never asked for in vain, and never yet stood more in need of, the kind indulgence of Your Excellency and the Council. The difficulties of the task which has devolved upon me are manifold and great. Perhaps Sir, no subject which can come under discussion is less suited for *viva voce* discussion than that which I am about to examine, demanding, as it does, a degree of clearness and precision in statement which few men can extemporaneously command; whilst the admitted difficulties of the subject itself are increased, in the present instance, by the consideration that the views which I am to offer to Your Excellency and the Council are diametrically opposed to those which are supported by my brethren of the Executive Government.

Nor is this all; for I am placed under the additional embarrassment of being called on to reply to a speech delivered, upon this question, by the chief Executive officer of Government in the Colony, which will demand much comment. But, having thus alluded to that speech, allow me here to say, that although, when I heard it, I did consider that it contained some passages which it would have been better to have modified, and some which it would have been well to have suppressed, I am now, upon further consideration, and making those liberal allowances to my hon. friend which he, I am certain, would be prepared to make to me, very happy to feel that there was nothing in that speech which should in the

smallest degree disturb that perfect harmony and excellent understanding in which we have lived since his arrival here ; nor anything which will require me to make a single observation calculated to wound his feelings. With these few prefatory remarks I pass at once into the argument. I am here, Sir, to show cause against the changes sought to be made in our judicial system, changes most fitly termed, in the resolutions of my hon. friend, "organic," for certainly, whatever may be thought of their principles or policy, to whatever extent their necessity or wisdom may be questioned, all must unreservedly admit that if in any plan, or at any time, any changes in any judicial system were ever proposed to which the phrase "organic" was truly applicable, that term does accurately describe the changes which are recommended in the report of the committee. Sir, I understand the chief of those changes to go to this extent, that we should substitute the principle of a number of local courts for the principle of a central Supreme Court with circuits ; and no one at all conversant with the subject can require to be told that in the principle of that substitution are involved some of the most important considerations which jurists or legislators can contemplate. This sweeping innovation, this truly organic change, is confessedly based upon two foundations, and but two : one being the length of time during which prisoners are now confined before trial ; and the other being the alleged grievance connected with the transport of the judges by means of the impressment system. Now I at once and fearlessly give my opinion, formed after the best consideration which my faculties allow me to bestow on any subject, that if those evils were to the full as great as they have been represented to be in the report of the committee, and in the able and animated speech of my hon. friend, I should still, while regretting their existence and desiring their removal, be prepared to contend that it was capable of a demonstration as complete as any of which the moral sciences admit, that the mischiefs which would be remedied by the system proposed by the majority, would be infinitely more than counterbalanced by the mischiefs which that system would inevitably create. Sir, it has been lately said or written, that the judicial Committee was proposed by Your Excellency in consequence of

public complaints. Upon this subject I may be allowed to say that, mixing a good deal with the public, taking an interest in the productions of the press, keeping as well as I can my eyes and ears open to see and hear what passes, I was wholly unaware, until I read that statement, that any such complaints existed. I do, indeed, remember to have seen in a paper of which the principles seem to me to be generally sound, and the literary ability such as to be a credit to the Colony, some facetious and not unfair remarks touching the unknown nature of the law administered, a law supposed to be contained in a number of books of which the public knew nothing, so that what her Majesty's loving subjects were to receive as law depended upon the state of the digestion of two gentlemen in Cape Town, and one who lives at Green Point. But of the judicial system of the Colony, of the machinery by which justice is administered, of the principle of a Supreme Court, of the constitution of Circuit Courts, I cannot, I repeat, call to mind any complaints whatever. What is the true history of our inquiry? I allude to this point, because it seems to me important to recall the point from which we started, seeing that we have really been so urged, by wind and wave, out of our course, and have so utterly lost sight of our original destination, that lying here without compass or rudder, it is most necessary that we should take an observation, and see where we find ourselves at last. Your Excellency's Finance Minute of the 28th May, 1844, which was the origin of the committee, is now before me. I shall not read its words. But every one who refers to it, will see at a glance that is conversant with the expense of the judicial system, and not with its alleged unpopularity, that the thing proposed to be done was to reduce the charge of that system without impairing its efficiency. Next came Your Excellency's Minute of the 31st March, 1845, which is printed with the proceedings of the committee, and in which Your Excellency was pleased to recommend to the consideration of the committee "whether the present circuit system, by which there are two periodical circuits in the year, and which costs £3,000 per annum in transport, is attended with beneficial consequences commensurate with its expense, or whether it may with advantage

modified." No one, Sir, who reads those two papers, and who remembers the circumstances of the case, can fail to be convinced that so far from its being supposed that gaol deliveries occurred too seldom, it was rather supposed that they occurred too often ; that the alleged hardship of impressment and previous imprisonment were matters never thought of, and that, but for quite opposite considerations, the committee would never have been appointed, and the report which I am presently to observe upon, would never have been made. The views then taken were of quite another nature. It was said "be your judicial system what it may, be its symmetry ever so perfect, and its working ever so satisfactory, it is proved by our Estimates to be a very expensive system, and it therefore becomes the duty of the Executive Government to endeavour to reduce the charge." The inquiry took its rise in no public complaints whatever, much less in any public complaints connected with the points upon which the report is based. But there is more than this. Many witnesses were examined by the committee, some by myself, more in my presence, and others when I had the honour to attend Your Excellency in another place. The whole of this evidence I have attentively considered, and I take upon me to assert, that within the four corners of this blue-book no single question will be found directed towards either of the points on which the report is founded ; and that the askers and answerers were alike innocent of any idea that the committee was to consider and report upon either of these points. A great deal we had about trial by jury in civil cases in Cape Town and Graham's Town ; a great deal about district sessions ; a great deal about a judge for the Eastern Province ; a great deal about additional magistrates and increase to their jurisdiction ; a great deal about the use of a grand jury, and the abolition of the clerks of the peace ; but about the evils of previous detention of prisoners before trial, or the complaints regarding impressment for judges' transport, we had nothing. An inquiry, commenced as I have stated, was most laboriously conducted for a long space of time ; and was at length closed without a single syllable having been breathed by any member, or by any witness, in reference to the

mischiefs now relied upon as demanding changes, or as to the organic changes which are said to be demanded. Is not this extraordinary? Can any parallel for it be produced? With me, even had I no other objection to these changes, this objection would be fatal. We examined largely, we put all sorts of questions to all sorts of people, we had much important evidence, we had much more surplusage, a matter of which I do not complain, since in an inquiry of that kind you can never have enough without having too much; but if it had, at any period of the investigation, crossed my mind that such a change as the suppression of a Supreme Court, and the substitution of five local courts instead, could be seriously contemplated, I would have said, "Do not close yet, you are awfully precipitate; let us have back the witnesses, let us hear what they have to say to these evils, let us hear what they have to say to your remedies, let us call again for the judges, let us summon our capitalists and merchants, let us have the opinions of the bar and the attorneys, before we determine on organic changes such as those which have been broached; let us not spare another month, or three weeks, in order to be accurately informed of their nature and effect." But we are spared all that, and, behold, at the eleventh hour up starts a report based upon two points not inquired into, and suggesting organic changes to the character of which we did not examine a single witness. In truth, sir, the whole proceeding, though I had nothing to do with it, seems most Irish; and a report founded, not upon what was in evidence, but what was not, may be called, with great propriety, an Irish report. It is curious to perceive the quarter from whence the light seems to have first broke. Mr Justice Menzies was examined by my hon. friend the Secretary to Government touching an increase in the jurisdiction of the resident magistrates. In his evidence upon this subject he referred to certain returns formerly obtained by him, by which it appeared that prisoners were detained in custody previous to trial upon an average $105\frac{1}{2}$ days. I have never heard that the learned judge who afforded this evidence blushed as he gave it in, nor does it seem to have struck any member of the committee with instant astonishment and horror. Upon the

18th of May Mr. Menzies made this statement. What immediate effect did it produce? Did it even strike the members as proving that at least two circuits were indispensable? It would appear not, and I advert to this because, when I am labouring to reduce things to their true proportions, it is important that I should call upon my hon. friends to examine their own minds, and see whether they may not have allowed themselves to magnify unduly certain matters which have thus come to occupy a space in their contemplation which they do not naturally fill. Sir, on the 26th of May, ten days afterwards, the examination of Mr. Menzies was resumed; and then, with the 105½ days in evidence before him, my hon. friend the Chairman's first question was, "Will you favour the committee with your opinion as to the expediency of reducing the circuits to one in the year?" Now it is quite true that my hon. friend while asking this question, may have been himself quite convinced that instead of one circuit being sufficient, four circuits were essential. But at the same time, seeing that the next question had reference to special commissions instead of any regular circuits, and knowing the fearless, candid, and straightforward way in which my hon. friend always comes to his point, I am of opinion that the revelation made by Mr. Justice Menzies, instead of seeming to require such organic changes as he now advocates, did not appear to call imperatively for the continuance of two circuits in the year. Now under those circumstances I must say, not by way of imputing blame, but in the exercise of that freedom which my sense of duty requires me to use, that the conduct of the majority is chargeable with undue precipitancy. Mr. Menzies had produced returns prepared 13 years ago. These returns showed an average previous detention of 105½ days. That detention had not, for a considerable time, attracted notice. But for myself I will say, if further reflection had at length opened my eyes to the iniquity of that which I had not, at first, felt to be a grievance, I should, I think, have said, "Before resorting to organic changes, let me get further returns; let me ascertain how the results obtained thirteen years ago harmonize with the results which are now experienced;" and not all my respect for the majority of the committee can withhold me from saying that it seems

not a little rash and ill-considered, first to assume the accuracy of those old returns, and then to assume that what was true thirteen years ago must be true now ; and then to come in with organic changes, based avowedly on these assumptions, without taking one tittle of evidence upon the nature and probable operation of those changes. Further returns, I believe, are now ordered. When they shall have been prepared, Your Excellency will doubtless submit them to this Council ; and until then, it will be prudent to avoid speculating upon the results which they will probably disclose. But in regard to the evils of detention previous to trial, I cannot hesitate to say, at once, that they have been, in my opinion, much exaggerated. This, Sir, is an important point, and I shall proceed to give my reasons for the opinion I advance. I begin by submitting that it is only to innocent men that this previous imprisonment can be considered as a hardship. To guilty men,—to men finally sentenced to a further and more severe punishment, in the measurement of which this previous punishment is taken into account,—to such men, I say, it would be absurd to argue that their confinement before trial is a hardship. What, then, is every sound system of justice bound to do ? It is, I conceive, bound to do this : to make a most searching, complete, and impartial inquiry into the charge brought against the accused party, so as not to incarcerate any man without due proof of guilt ; but having done that, and elicited such proof of criminality as might, in general, almost warrant a final sentence, I am slow to see how a few days' detention, more or less, can be deemed to be an object of such importance as to call for organic changes. How does the system of this Colony fulfil the condition spoken of ? I think completely. England has been referred to, and comparisons have been thence derived very unfavourable to the Colony. But I contend that the practice in England is not, in reference to confinement before trial, so careful of the liberty of the subject as the practice here. Why ? Because in England the committing magistrate is usually not stipendiary, but one of the class whom the newspapers call “ the great unpaid,” and whatever my hon. friend the Secretary to Government may say, unpaid magistrates have not the same sense of responsibility as magistrates who are salaried. When

the magistrate has once committed the man to gaol, there he lies until a bill of indictment is preferred against him before a grand jury, and he is either discharged by their finding, or sent at once to the petit jury. Contrast with this the course of proceeding in this Colony. The clerk of the peace, a public officer, appointed, not to get convictions or to press points against accused men, as private prosecutors will, but to be as careful that the innocent are protected as that the guilty are brought to justice, has his duties defined by Ordinance 40, section 30. He is enjoined to bring before the investigating magistrate not merely all witnesses against the accused, or such witnesses as shall suffice to establish a *prima facie* case against him, but all witnesses who know anything about the case; in order that the magistrate shall have, when he comes in his turn to do his duty, as much evidence on every side as can be obtained. No such functionary as our clerk of the peace exists in England. I have said that if any clerk of the peace should forget that he acts for public justice and not against alleged criminals, he violates his duty. But a sort of professional feeling may be imparted to him by his ordinary duty; he may insensibly lose his impartiality by acting as a prosecutor; and lest he should do so, there is the magistrate to check him. He is responsible, he is calm, he has nothing to pervert his judgment, and even if the clerk of the peace should press him to commit, he will not commit, unless he sees good grounds. Is this all? No. As soon as the preparatory examination is completed, it is laid before the Attorney-General for his consideration. Should it appear to him that the evidence is defective, he orders at once the liberation of the prisoner. Is any such practice known in England? Sir, the Attorney-General of England would stare if he were called upon to read all depositions taken in every case in which the prisoner was committed for trial. But the law of this Colony imposes upon me the duty discharged by the Lord Advocate in Scotland, a duty discharged inefficiently perhaps, but I will say honestly and anxiously, and with a constant care to perform what are, in fact, the functions of a grand jury, not, give me leave to say, at the railway rate at which, at home, grand juries frequently find bills, but with all possible circumspection and deliberation. Why, Sir, there have been times and countries,

and those neither distant nor unenlightened, in which such a severe and satisfactory inquiry as I have described would have been deemed sufficient to justify the pronouncing of a final sentence of condemnation. Allow me to say, then, that however plausible it may sound to expatiate upon the grievance of so long confining untried men, the nature and magnitude of that grievance cannot be fairly represented or fully understood unless the safeguards which we provide against oppression and injustice are also taken into account. Innocent men, it may be safely asserted, are very rarely, almost never, kept in prison in this Colony. Test this, Sir, by comparing the committals with the acquittals. In the report which we of the minority proposed, we state that the only English returns we could find were for the years 1834 and 1835, and that in those years $28\frac{1}{2}$ per cent of the numbers committed for trial were ultimately acquitted, while, owing to the precautionary practice of this Colony, the proportion of acquittals to committals, so far as we had returns, was under 9 per cent. In his able speech the other day my hon. friend (the Secretary to Government) fell foul, to use a vulgar phrase, of this calculation, and he argues that in giving 9 per cent. we are much under the truth, and that the real proportion is 33 per cent. I was somewhat startled to hear this ; but when my hon. friend proceeded to make out his 33 per cent, I became comfortable, for I found that his first step was to charge against me as acquittals all the cases which, after reading the depositions, the Attorney-General had remitted for trial under the summary jurisdiction of the magistrate's court. Now, I must express my wonder at the process by which these cases came to be considered as acquittals, because it is notorious (I speak in the hearing of several magistrates and clerks of the peace) that acquittals in remitted cases are almost entirely unknown. They are always plain cases of the pettier sorts of crime. Doubtless if my hon. friend will insist upon counting these cases against me, that is, if he will add to his acquittals a number of cases in which there were convictions, and then call the sum total all acquittals, he may undoubtedly make out his 33 per cent. But I say that the proper way of estimating the matter is not to charge me with, but to give me credit for, the remitted cases, to account them

to be, what they really are, convictions ; and then the proportion of acquittals to convictions, instead of being 9 per cent. will be reduced below 7 per cent. But besides charging me with the remitted cases, my hon. friend charged me also with all untried cases. Prisoners die ; prisoners escape from custody ; prisoners whose guilt is manifest are discharged because witnesses have died or left the Colony. But all such cases my hon. friend claims as acquittals. I wholly deny the justice of his claim. But if I were to make him a present of the untried cases, the acquittals would still, instead of 33 per cent, be under 17 per cent. Sir, I hold in my hand a return which has been prepared in my office, to which I shall presently call the attention of the Council, in reference to the number of days for which prisoners were, for the last two years, confined previous to trial, but appended to the table is a memorandum relative to the circumstances under which prisoners are sometimes not tried, sometimes acquitted, which I shall, with Your Excellency's permission, read to the Council :—

“Of the 215 prisoners confined in the country districts for more than 100 days during the three years alluded to, 166 were convicted ; 2 escaped from custody ; 3 died in jail ; 4 remained in custody, their trial having been postponed ; 16 were not brought to trial, and 24 were acquitted.

“Of the 16 not brought to trial, 3 were ordered to be liberated upon the instant that certain depositions in their favour were received, 2 were reluctantly discharged, the evidence being considered insufficient legally to establish almost manifest guilt ; 1, although indicted, was not proceeded against, a joint-offender having pleaded guilty, and the previous imprisonment of the other being considered a sufficient punishment in this case, in which there were mitigating circumstances ; 1 (a case of perjury) was ordered to be liberated, the public prosecutor considering the imprisonment already suffered a sufficient punishment under the circumstances of the case ; 1 (a case of malicious injury to property), although indicted, was ultimately liberated, the witnesses not appearing at the trial, bail being therefore given for the accused, and the injured party interfering in his favour on the ground of subsequent good

conduct ; 4 were discharged after indictment, the witnesses upon whose evidence they were indicted failing to appear at the second sitting of court subsequent to commitment ; 2 were liberated without trial, after indictment, there being no sufficient evidence to establish the fact that they were British-born subjects, so as to render them liable for undeniable offences committed by them beyond the boundary, Against one the indictment was withdrawn,—a theft of wine having been charged, instead of a theft of brandy. He might have been tried again but he was liberated at once, it being considered that further imprisonment would be a hardship. In the 16th case, one charging the receiving of stolen goods, it transpired that the accused was the reputed wife of the thief, and she was allowed an advantage not claimable by law.

“Of the 25 acquittals, one was the consequence of the evidence on the trial varying in some degree from that given before the magistrate, together with a doubt as to whether the accused had had that kind of possession of the article which is necessary to charge theft.

“In another case the witnesses could not identify the prisoner (a soldier), although they swore to him before the magistrate.

“In another case, including two prisoners, the indictment alleged the property (a cow) to be that one Roux (a wandering trader) or otherwise of some person or persons to the prosecutor unknown. The court said that the prosecutor should have alleged the ownership in the one way or the other, and suggested that a verdict of not guilty should be returned, especially as the evidence was circumstantial.

“In another case the acquittal was consequent upon the non-attendance of the principal witness.

“In another, where two prisoners were indicted for a joint act, the principal witness was found the reputed wife of one of them, and it was considered that her evidence should not be used against him ; and he was acquitted, while his brother thief was convicted.

“In a case of rape the evidence fully substantiated the assault. But the injured party (a child) not being able to swear that there was emission as well as penetration, the criminal was acquitted.

“In another case (rape also) the complainant admitted that she

had continued to reside under the same roof with the accused (who was the reputed husband of her aunt) after he had twice assaulted her against her will, and this naturally threw so much discredit upon her character, that the prisoner was acquitted.

"In a case including three prisoners, there was an acquittal, although the evidence left very little moral doubt of guilt. The remains of a heifer were found and by it the spoor of three persons which answered exactly to that of the three prisoners, who had, moreover, been seen near the spot on the day in question. Beef, too, had been seen in their possession, a fact which they at first denied, but which was afterwards admitted by one of them, in the presence of the others, saying that it was flesh of a heifer that they had found vultures devouring.

"In a case of assault with intent to murder, the indictment stated the injured party to be Damon, instead of Jacob Damon, and of course there was an acquittal. The offender might have been indicted afresh. But he was young, and his imprisonment had been a lengthened one ; and on these grounds the court considered that he should be discharged.

"In one case the acquittal was the consequence of the destruction of a coffee bag. The prisoner and another (both soldiers) were seen on a certain night carrying a bag evidently containing coffee, in the direction of the barracks at Colesberg, and there a bag of coffee was subsequently found concealed. No report was made to the clerk of the peace ; the coffee remaining for some time in the guard room, awaiting a claimant. It was then used up by the men, and the bag was thrown away. The owner of the property, who had been beyond the boundary, discovered his loss on his return to Colesberg ; inquiry being instituted, the prisoner was apprehended (the other alleged offender having made his escape). He was brought to trial ; and upon the evidence there was no doubt whatever that he had stolen a bag of coffee. But through the non-production of the coffee-bag, it could not be made incontrovertibly clear that the property stolen was that of the party alleged in the indictment ; and the rogue was acquitted.

"In two cases of murder, there were acquittals although the

circumstances were of a very grave nature as they affected the accused. In one of these the jury came to the conclusion that the deceased had stabbed himself in the course of a quarrel with the accused, who had induced the other's reputed wife to cohabit with him. *Note.*—It is now remembered that the other party acquitted on the charge of murder was bailed by the Supreme Court, and that he was imprisoned for much less than 100 days.

"In a case of arson, one of the prisoners was acquitted. She was alleged to have spirited up the two others (children) to commit the offence. But the evidence on the trial was materially different from that before the magistrate.

"In eight cases the grounds of acquittal are not stated.

"The average detention of prisoners confined for periods exceeding 100 days is by the returns already printed, 180.87 ; by the returns for the last two years, 151.14. The greatest number of days of detention, according to the former, is 465 : by the latter the highest case appears to be 368. This excess of twelve months by three days, was owing to the fact that the spring circuit court for Graaff Reinet sat in the September of one year, and in the October of the next ; there having been a postponement of the particular case in question at the intermediate sitting."

So far as this memorandum goes, it throws, I think, some light upon the hardship of previous confinement in this Colony. Another point should not pass unnoticed. In the three years embraced in the return in my hand there were 51 acquittals, and out of these no fewer than 28, or 55 per cent. of the whole, were cases in which the accused were bailed in the first instance, and never committed at all. In all probability more were bailed after commitment ; but of these cases I have no cognizance, since it is only when the party is bailed at the moment that I learnt the fact ; but not to insist upon this, it is enough to say, that if your acquittals are below 9 per cent of your committals, and if at last 55 per cent. of your acquittals are cases in which there never was an hour's imprisonment, it may well be doubted whether the facts can be deemed to bear out all the strong statements of the report of the committee, and of my hon. friend in his animated speech the other day. To

guilty men, I repeat, that previous imprisonment is no hardship. It is invariably taken into account by the presiding judge in passing what he considers a fitting sentence. Were there actual convictions in every case, no man could gravely speak about a grievance, and taking into account the actual state of things, I must say that we must put our sympathies to the torture before we can be moved to such a degree as to disorganize established, important, and useful institutions, in order that such prisoners as we are speaking of should be tried some days earlier than they are at present. So much as to the class of men,—now as to the time of their detention. Returns, as I have already said, are called for, and in course of preparation, intended to take up the subject where Mr. Justice Menzies left it,—and to exhibit the working of more modern practice. Here I refer again to the return compiled from the records in my office, which I have already quoted for another purpose. It shows the number of days, prior to trial or enlargement, for which each prisoner was confined for the two years ending with the close of last circuit. This return will lie on the table for the information of the Council; but, in the meantime, I shall give its results. In Albany, the majority assume an average of 141·9 days. This return gives 106·16 days, being a difference of 34·93. In Uitenhage the majority assume an average of 115·56 days. This return gives 84·91 days, being a difference of 30·65 days. In Somerset the majority assume 153·8 days. This return gives 115·43 days, being a difference of 37·65 days. In Graaff-Reinet the majority assume 133·4 days. This return gives 111·50 days, being a difference of 21·5 days. In Stellenbosch the majority assume 98·1 days. This return gives 81·88, being a difference of 16·13 days. In George the majority assume 83·9 days. This return gives 77·50 days, being a difference of 5·59 days. In Swellendam the majority assume 127·2 days. This return gives 70·95 days, being a difference of 56·7 days. In Beaufort the majority assume 178·13 days. This return gives 84·66, being a difference of 93·47 days. In Clanwilliam the majority assume 181·6 days. This return gives 105·27, being a difference of 75·79 days. The only case in which the majority's average is sustained is that of Worcester, and then, for special

reasons which it would be tedious to explain, the average of this return gives two days imprisonment more than the average of the majority. Now, Sir, having shown you the sort of characters who are subjected to this previous imprisonment, and given you some reason for believing that the length of that imprisonment is less than has been represented, I put it to this Council, I put it to this Colony, whether, in order by four circuits to save some thirty or forty days of such confinement (should it be possible to save so many, which I doubt), it is expedient to destroy the whole judicial system of the Colony, and introduce organic changes? But I shall be told, "you have talked only about criminals; what do you say to witnesses?" Sir, I have very little to say to witnesses. By an ordinance of this Colony passed while there were, as now, but two circuits, and passed I believe without opposition, it is provided that when any important witness, in any important case, is a person who, from wandering habits, probability of being corrupted, or other cause, is not likely to be forthcoming at the trial, it is competent for the magistrate to require some security for the witness's appearance; and, in default of such security being given, to commit to prison. Such is the reason of the law, and such is the extent of the law. If you do not like the reason, repeal the law. But, in my opinion, it will be far simpler, and far better, to repeal the law than to repeal the Charter of Justice—break up the Supreme Court—and change the whole judicial system of the Colony. And here, Sir, I complain that my hon. friend has fallen into unintentional exaggeration. I think that more is made of the imprisonment of witnesses than the circumstances will warrant. By the return inserted in the proceedings of the committee, it will be seen that in Wynberg no witnesses ever were committed; in Malmesbury none; in Clanwilliam none; in Beaufort none; in Swellendam none; in Caledon none; in Port Elizabeth none, and in Albany none, for the last three years. In all the districts during 1842, 1843, and 1844, 79 witnesses were imprisoned, of whom no fewer than 35 were imprisoned in Cradock, where, the resident magistrate states, "nearly the whole of the abovenamed individuals were allowed to remain outside the prison, some on

bail, and others in charge of the gaoler." Now, however bad in principle the confinement of witnesses may be, and I for one consider it to be very bad, I put it to any man who hears me, whether or not the mischief is not exaggerated; in truth, the evil, considered in itself, is not, and would not be deemed to be such a mighty mischief, but for circumstances which have no natural connection with confinement. But my hon. friend, in one of the most striking passages of his speech, described in detail, as applicable alike to prisoners and witnesses (I hope with some inaccuracy as regards the latter), a course of treatment in the prisons of the Colony against which the feelings of every humane man revolt. He described the fetters, the chain, the bar, to which men, innocent or untried, were fastened, and the misery of the position in which they were compelled to be kept each night, in order to prevent them from escaping. Now all this is very bad. But what has all this to do with the judicial system? Sir, it has nothing to do with the judicial system, but is a matter for which, if any party be responsible, it is the Executive Government. And while I deplore such a state of the gaols as renders such treatment necessary, while I deem it to be a great and gross grievance, and while I look forward to some speedy measure for abating the monstrous nuisance, a sense of justice to the Government and the public which have tolerated such a state of things so long, will not allow me to refrain from alluding to the slow advance of improvement in regard to prisons and prison discipline in England. It was in 1783, I think, that Howard gave the world his book, revealing the melancholy state of the prisons as well in England as on the continent. From that time much attention was devoted to the subject in connection with which the illustrious author has made his name immortal in the annals of benevolence. But till a comparatively late period, much remained to be accomplished. In a work which its unpretending title does not prevent me from quoting, a work of much convenience to persons who have not access to parliamentary papers and reports, and from which I infer my hon. friend obtained the table, showing the average duration of imprisonment in England to which he referred, the *Penny Cyclo-pædia*, I find the following passage under the title "Transportation."

Sir, I am disappointed. I have, unfortunately, brought with me a wrong volume. But I can remember enough of what I read to tell you that in 1823 there were many prisons in England in which there was no separation between males and females, many in which the inmates were miserably overcrowded, many in which prisoners on their first reception were fettered with double irons, from 10 lb. to 14 lb. weight, and chained to the floor all night. The description of my hon. friend, strong as it was, would be scarcely strong enough for what was common, even in England, so late as 1823. Sir, such things in England are better ordered now. How came the change to pass? Was it by dismembering Westminster Hall? Was it by cutting up the country into twelve judicial circles, and putting one of the twelve judges into each? No such thing. They took another course, too obvious and oid-fashioned, perhaps, to please the majority of the committee, but yet upon the whole a good one; they improved their prisons, Sir, and brought them into such a state that prisoners might be detained without being tortured. This matter concerning our public prisons has been often before this Council. It will be in the recollection of several members, that when the then Executive endeavoured to prevail upon Her Majesty's Government to consent to the re-issue of a part of the colonial paper money for the promotion of public work, General Bell drew up an able memorandum, in which he showed, amongst other things that money was imperatively needed in order to raise from their disgraceful state the prisons of the Colony. Since then the subject has been often mentioned. I myself remember to have called attention to it in reference to such scenes as my hon. friend has himself depicted, and to have illustrated the condition of our prisons by an absurd extract I had read from some American paper, to the effect that a prisoner in a certain gaol, which was specified, had written to the sheriff, stating that unless something were done without delay to the walls, he would unquestionably stay no longer, as it was with the utmost difficulty he could keep himself confined. The story is not worth repeating, except to recall the conversation. Now, from the nature of the case, might we not have expected from the majority some movement towards the improvement of our gaols? But,

no. The mischief is mentioned in the report, but the report is silent as to a remedy ; and the allusion to the subject in the able speech of my hon. friend is equally unpromising. " If it is necessary," he says (I quote from the *Cape Town Mail*), " that persons should be so secured when apprehended, and our poverty will not enable us either to maintain a sufficient police to guard them, or to build some secure gaols for keeping them in without resorting to such means, the next best thing to be done is to take the most effectual means for keeping them there the shortest possible period." I do not consider that we are in such poverty as my hon. friend supposes ; and it certainly does strike my humble understanding that it would have been more safe, more rational, and more practical, to have determined to improve the gaols, rather than leaving them as they are, to give four circuits. Premises are stated from which I, as an Irishman, and so, I suppose, given to blundering, would have deduced the necessity of building prisons ; but no, rather than build prisons we prefer to break down courts. What will be the consequence ? Why, were you to create your local courts to-morrow, and to give four circuits, even then, if there is to be a reference of the case to the Attorney-General for the preparation of the indictment, a previous imprisonment of at least forty days will, upon the average, still take place. Now are you prepared to allow untried men to be fettered each night, in order to be loosed each morning, for an average of forty days ? Can you satisfy yourselves by saying that you will reduce the term of torture—illegal torture, I call it, upon the authority of Lord Coke—but that for the reduced term it shall continue ? Sir, if circumstances were altered, if our gaols were a credit to the Colony instead of being a disgrace, if we had the means of classifying the inmates, if we could show separate apartments for witnesses, if we could keep criminals of one description free from contact with criminals of another, then I should feel that my task this day was greatly lightened, having no longer to contend against the impression which the manner of confinement in our prisons, although a matter wholly beside the judicial system, is calculated to produce. But many persons who will not pause to weigh and consider the real merits of the case, will be carried

away by their just dislike of stocks and fetters, and forget that such things are no part of any judicial system whatever, and should not be tolerated for an hour after they can be spared. Upon this subject I appeal to you to act as men of understanding. Build gaols, I implore you, before you build castles in the air ; build gaols, I implore you, before you build breakwaters in the sea ; build gaols, I implore you, before you break down strong courts. Sir, one of the resolutions which I shall propose before I sit down, will be directed to this subject ; and I shall now leave it to the favourable consideration of Your Excellency and the Council, with only this further remark, that while it clearly is a subject deserving of immediate attention, it is one which has no legitimate connection with the judicial system now established in the Colony. Reverting to the question of previous confinement, and the comparison instituted by my hon. friend between England and this Colony, I would caution the Council against looking exclusively to ratios and averages, instead of to absolute numbers. When we say that in England there are but two circuits in the year, we are told that we forget the large powers belonging to the courts of quarter sessions, and the large proportion of criminal cases of which those courts dispose. My hon. friend falls back upon comparative percentages, and tells me that a much larger proportion of prisoners is detained in this Colony for a given space of time than is detained in England for the same space of time. This certainly is one way of considering the subject. But, for the purpose of the present argument, I do not consider it to be the only way. There are in England certain cases which are sent to the assizes and not to sessions. The assizes are held but twice a year, and in the four great northern counties, with their dense population and large amount of crime, the assizes, until a comparatively recent period, were held but once. Now looking to percentages and proportions, my hon. friend may show me that a larger ratio of our prisoners are detained for upwards of 100 days than is the case in England. But he cannot show me that for one man who is, in this Colony, detained on account of half-yearly circuits, there are not ten men in England detained on account of half-yearly circuits. Now, when this matter

is pressed upon us as a matter of principle, as a matter independent of expediency, and in which justice is involved, I ask whether the crime of England is not, in the face of men and angels, ten times greater than the crime of this Colony, considering how carefully our judicial system confines committals to the almost necessarily guilty? Compare, again, the effects likely to be produced by the imprisonment of untried men in England, with the effects likely to be produced by the imprisonment of untried men in this Colony. Can it reasonably be doubted that such imprisonment is more felt by prisoners in England than it is by prisoners here? Let me not be misunderstood. I should be sorry to be thought to view with indifference, much less contempt, the feelings of men of any class or colour. Do I forget my principles, which are those of a thoroughgoing philanthropist, as we commonly call them, when I say that the circumstances and condition of our lower order in this Colony are such as to make previous confinement in a prison, with prison rations, by no means so irksome a thing as it is felt in England? Let it not be said that I am reflecting upon the poor man, or careless about the treatment of Hottentots, or late slaves. Not so. Far from it. Why, in my own country, the question of prison rationing has been notoriously embarrassed by the difficulty of fixing it upon such a scale as should give good and sufficient food, and at the same time such as should not diminish the dislike of going to gaol. As an Irishman, I grieve for this; but I do not reproach my countrymen with their poverty. I cast no imputation upon Hottentot or late apprentice when I say that to be supported in idleness is not felt by them generally to be a grievance, even though supported in prison; and I conceive that the Secretary to Government was correct in stating that they did not deem the previous confinement a positive hardship. The statement of my hon. friend has attracted the notice of the able writer to whom I alluded in a previous part of this address. He holds it to be absurd to say that men do not dislike gaols whom you fether to keep there. This is certainly plausible, and perhaps sound. But I have two answers to offer to it; one, that although it were perfectly certain that a large majority of prisoners would

not wish to escape, yet that for the sake of the one or two who may desert, you must indiscriminately secure the whole; and the other, that a man who feels his present state, considered in itself, not to be a bad one, may yet wish to escape from it in order to avoid some future punishment which he apprehends; so that he who would not object to be the idle guest of the gaoler, may very consistently object to an introduction to the judge. But am I arguing that previous confinement is not an evil? By no means; I am only endeavouring to reduce the evil to its real magnitude. I admit that it is an evil, to be still farther reduced by every safe and proper mode that we can devise. I know that in the eye of the law every man, no matter how careful our preliminary processes, is to be deemed innocent until he is proved guilty, and therefore that his confinement before his final sentence should be as short as possible. I know that when the interval in question is much protracted, evidence sometimes escapes, and the ends of justice are defeated. I know that a long delay between commitment and trial is injurious, because it interposes a gulf between delinquency and punishment. But taking into account all the circumstances of the case, I must say, as a practical man, that while I should gladly diminish the period of previous imprisonment, I cannot consent to diminish it by the dangerous means which my hon. friend suggests. Sir, in reference to this subject the minority of the committee have stated, in the report proposed by me, that considering the few criminal cases in this Colony, criminal sessions may possibly be held too frequently. I need not say, what is very well known, that for the passage in question I am exclusively responsible. This passage had the misfortune to attract the attention, and I think I may say, to excite the indignation, of my hon. friend, who made some very strong remarks upon it. He will not think, nor will Your Excellency or the Council think, that I overstep the wholesome limits within which it is my wish to walk, when I give my opinion that, in saying that he would not, for the whole Colony, have signed a report containing such a passage, that he would rather have lost his hand than have done so, and so on, he fell into the error of confounding things which common justice requires to be kept separate;

and visited what he should have deemed, at worst, an unintentional mistake, with a severity of censure that ought to be reserved for some wilful violation of the laws of morality and honour. I was the more sorry for the tone which my hon. friend assumed in reference to this passage, because it seemed to me to have led him to lose sight in some degree of his usual fairness, and, while abstaining from reading the whole clause, to have fastened on one phrase, in a manner usual enough with opposing parties in the House of Commons, but which is not customary amongst public servants, and which I therefore had not expected from my hon. friend. I shall now, Sir, read the passage which had the misfortune to strike my hon. friend as so disgraceful. "Your committee are disposed to think that considering the paucity of criminal cases in this Colony, and particularly in the country districts, criminal sessions may possibly be held too frequently. Except so far as by the trial and punishment of offenders, the minds of the mass are educated into a state in which, anterior to all reasoning about consequences, crime comes, by a sort of moral instinct, to be regarded as a thing not to be committed, trials and punishments entailed an almost useless amount of suffering and expense. The trial, therefore, as well as the punishment, should be public, and should be witnessed by the public. When solemn sittings are held at intervals, during which such a number of cases has arisen as will attract an audience and fix attention, salutary lessons may be given, which could not be inculcated if cases were to be disposed of pretty much as they come in, in the presence merely of the parties interested, the officers of the court, and such loungers as might straggle in." And now, Sir, having read the whole of the obnoxious paragraph, I am not prepared to say that there is anything in the sentiment or spirit of it of which I ought to be ashamed. But I now perceive that it contains a very infelicitous expression. I allude to the words "attract an audience." These words have unhappily a theatrical sound, and are associated with scenes got up for public entertainment. They look as if we were viewing trials in which the lives and liberties of men are involved, as we would view a play to be performed for amusement. Need I assure you, Sir, that this notion, which was at

the bottom of all the Secretary said, was far, very far, from my mind when I penned the passage? But it speaks for itself, and I shall say no more of it than this, that I should have expected from my hon. friend a more candid construction of my meaning, and that I feel more comfortable as the writer of the passage so severely criticized than I should do as its not very fair or very formidable critic. Sir, I have done with the point regarding the previous detention of prisoners. I now come to the other point, on which the plan of the majority is based,—transport of the circuit judges by impressment. It is at once admitted that impressment is, in principle, a most objectionable mode of obtaining transport. The nature of the thing is arbitrary. All that can be said about it is, that from the very beginning, from time whereof the memory of man in this Colony runneth not to the contrary, horses and oxen have been impressed for the public service. I am no advocate for sending the judges circuit by means of impressment. I do not, however, regard impressment for the circuit judges as different from impressment generally. The mischief of impressment is general; and if remedied at all, should be remedied as a whole. I am not about to enter into minute calculations to show the amount of impressment transport for the circuit judges as compared with impressment transport for other purposes, but I have seen a return of the —————

SECRETARY TO GOVERNMENT :—Allow me to say that the return to which you are about to refer is erroneous, and has been returned to the officer who furnished it for amendment. It is inaccurate from beginning to end, or nearly so.

ATTORNEY-GENERAL :—In the face of such statement, I shall make no further reference to the return in question. I shall confine myself to notorious facts. It will be for the able functionary who framed that return to give such explanation here or in another place, as he may deem to be required. In the meantime, I advance it as a matter incapable of dispute, that much other transport is impressed as well as the judges' transport; and without stating anything about absolute amounts, I shall be much surprised if it do not prove, after the most sifting inquiry, that the

impressment for the circuit judges shrinks into very small proportions when compared with the impressment made for other public purposes. I have travelled over the Colony twice, once with the Chief Justice in 1840, and again, Sir, with yourself during the present year, and, upon both occasions, I endeavoured to ascertain the notions of the Boers upon such matters ; and although I have heard complaints of the inadequacy of the tariff, I never heard complaints of the system of impressment generally ; and much less any complaints that impressment for the judges was particularly oppressive. But I am favourable to contract instead of impressment service universally. To apply the contract, or any other non-impressment principle, to the conveyance of the judges, and then say that impressment was abolished, would be fallacious, and I would not have you keep the word of promise to the ear to break it to the hope. Some power of impressment, however, must exist. I will not purchase a cheap popularity by saying that when a public functionary is travelling in this Colony, and horses die, or wagons break down, or any of those accidents occur which the roads here render so frequent, notwithstanding the improvements in that way which my hon. friend has the mind of promoting, that the functionary so situated must shift as he can, still he is to possess no power of requiring the inhabitants to furnish, for fair remuneration, the means of transport. But I would make impressment the exception, and contract the rule ; agreeing beforehand for every service capable of being so agreed for, and leaving emergencies, against which there was no providing, to be met by the power of impressment. I have now, Sir, traced the history of the recent inquiry, contrasted its commencement with its close, examined the two points upon which the report is based, and shewn that the evils alleged either admit of other modes of removal, or are not of such magnitude as to justify violent remedies. Upon an accurate investigation it will be found, I think, that those evils greatly diminish, though they may not wholly disappear, and it now becomes my duty to direct the attention of the Council to the nature of the cure proposed by the majority of the committee. The evils being considered, the remedies.

come next ; and to these I shall, at once, address myself. Sir, I am now to observe upon that able document, the report presented to the Council by my hon. friend. It is, in many respects, a very well drawn paper. My hon. friend, it will be remembered, made some fair remarks upon what we call the report of the minority. It seemed to him, I think, to contain too much philosophy, and too little figuring. To me, upon the other hand, it appears that the report of the majority contains too much figuring and too little philosophy. Mr. Canning once said, that in the debates of Parliament there was only one thing more suspicious than a statement of facts, and that was, a table of figures. But my hon. friend luxuriates in figures, and holds his footing over a Serbonian bog in which I can scarcely keep myself from sinking. Figures are so numerous in the report that I can scarcely see the reasoning, nor how the premises and conclusions are sought to be connected. We have the number of horses used on circuit, the number of oxen, the number of drivers, the number of leaders, the number of guides. I should have had no objection to further returns, shewing the number of people with whom the circuit judge shook hands, distinguishing the Heeren from the Vrouwen, the number of cups of tea poured out for him, and how often upon an average he daily uttered, *Go'en dag!* Such a return I should have regarded as an interesting addition to the statistics of the Colony, though not, perhaps, of any very great importance in reference to the matter in hand. But while the report seems to me to be in some respects redundant, it is, in others, singularly meagre. The report ought, I think, to cover and fortify the whole ground which the committee was determined to take up. This it does not do. Devoting a most undue proportion of it to figures and returns, the majority leave a number of most important points wholly undiscussed ; merely reciting, in regard to them, the resolutions which were passed. The increase in the number and jurisdiction of the resident magistrates rests in this position. No defence of the abolition of clerks of the peace is attempted, although the most acute and powerful reasoner in the Colony had in his evidence given elaborate arguments for continuing the office. We, of the

minority, consider that the subject should not be passed over in that way ; and, in consequence, I myself, *impar congressus Achilli* ventured to break a lance upon this ground with Mr. Justice Menzies. But the majority had their heads so full of one subject that they could see no other. Again, they resolve against the grand jury system. But they state no reason why. Perhaps this was prudent, for in consequence of our discussion of the point, we, have, to our no small consternation, brought down the Chief Justice upon us, in such a way as to impress us with deep regret for our rashness. Above all, I should have thought that the changes projected in the sheriff's department would have been fully explained and defended ; but they rest upon a simple assertion of the opinion of the committee, that public officers should not be paid by fees. And finally, Sir, a most difficult, and what they themselves consider a most important, point is left in the same position ; I need scarcely say that I allude to trial by jury in civil cases. The majority resolve, out-voting the minority, that trial by jury in civil cases should be adopted throughout the Colony ; but in their reports they give neither facts, nor figures, nor argument, in support of the conclusion. I admit, however, that what the report wanted, the speech of my hon. friend supplied ; for his discussion of the subject seemed to me to be the most laboured and elaborate part of his able address. And now, Sir, before applying myself to the main principle of the committee's plan, I shall take the opportunity to dispose as well as I am able, of this subordinate but connected question regarding the extent to which trial by jury in civil cases should now be introduced. My hon. friend took the minority pretty sharply to task in reference to their treatment of this question. I considered, at the time, that he was imputing something discreditable, and felt somewhat indignant, which led to the little ebullition with which I concluded the debate. I am now, Sir, not indeed as cool as an icicle, for the heat of the chamber and the exertion of speaking wholly preclude that ; but, at the same time, quite good humoured, and in the most perfect charity with my hon. friend. I dispute, indeed, the justice of his remarks. We are not conscious of either "vibrating," or "oscillating," or being "counsel for the bench and bar," or of

not being able "to afford to be explicit." On the contrary, we think our views to be as clear and consistent in themselves as we know them to be fairly and honestly entertained. We considered ourselves to be walking very steadily, and nothing which we have heard from my hon. friend has shaken that impression. The majority obviously regard trial by jury as an important part of their system ; and I hope I give them no offence by saying that they cannot like it the less because it is supposed to be popular, and is calculated to render popular any plan of which it forms a part. My hon. friend exerted himself very much, and was not a little ingenious, in reference to this question. We of the minority are for keeping the people of this Colony in a "state of apprenticeship," my hon. friend offers them "immediate emancipation." In regard to this I shall merely observe, that with all my fondness for freedom, I am not disposed to grant any liberty which would prove plainly prejudicial to the parties themselves ; that I do not see how trial by jury in civil cases can properly be called "emancipation," or a continuance of the present mode of deciding facts, "apprenticeship ;" that I think, therefore, the metaphor is violent ; and that I remember, at all events, that a metaphor is no argument at all. My hon. friend also ranged so far as to refer to the emigrants from England whose arrival is now looked for. He fears that they will be discontented when they find that they have come to a degraded Colony, by which he means a Colony where trial by jury in civil cases does not exist. I confess, for my own part, that I do not partake upon this subject the apprehensions of my hon. friend. When the parties have communicated with the emigration agent about their wages, and their food, and their probable habitation, they will never stop to enquire, "Do they try by jury in civil cases?" In the opinion of some people, the emigrants would probably be more interested in ascertaining how criminal cases are disposed of in the Colony. Then, my hon. friend referred to resolutions passed at a public meeting in favour of a Representative Assembly. When the question of a Representative Assembly comes before me, I shall give my opinion upon it ; merely remarking at present, that none of my principles would lead me to oppose any safe extension

of rational liberty, and that I can see no natural connexion between a Representative Assembly and trial by jury in civil cases. Now, instead of going so far a-field for topics, I could have wished that my hon. friend had applied himself to the two arguments put forward in the report of the minority; but of these he took no notice whatsoever. One of those arguments is to this effect. Admitting the competency of our colonists to serve as jurymen in criminal cases, it will not follow that they are competent to act as jurymen in civil cases. We admit, indeed, that the questions in the one are not necessarily more difficult than the questions in the other. But in criminal cases the defendant is to have a verdict where the evidence leaves a reasonable doubt, while in civil cases the defendant is not to have a verdict where the plaintiff's evidence at all preponderates. No judge, in charging a jury in a civil case, could say, "Gentlemen, the plaintiff has given such and such evidence, and the defendant such and such; if the plaintiff has satisfied you beyond a reasonable doubt that his case is good, you will find a verdict in his favour, but if, on the other hand, you entertain a reasonable doubt of the defendant's liability it will be your duty to give him the benefit of the doubt." But this is the way to charge the jury in a criminal case. What is the inference? Why, as it is easier to distinguish between white and black than between two shades of grey, so it requires less acumen to see when evidence preponderates to the degree required by law in criminal cases, than to see when it just preponderates, and does no more. I trust, Sir, that I am not falling into philosophy. I must, I feel, be very careful in this matter, or I shall be pointed at as a philosopher in the very streets. But I shall be asked to distinguish between a reasonable doubt and a doubt which is not reasonable, and how a jurymen in a criminal case is to tell what sort of doubt he has? I am not metaphysician enough for this. But in practice I know that embarrassment is rarely caused by any such consideration, for where there is a doubt about the sufficiency of a doubt, humanity carries it, and the prisoner is acquitted. I conceive, as we have stated in our report, that the importance of jury trial in criminal cases cannot be over-estimated. But have its

principles been ever yet fully exercised in the country parts of this Colony? Do we not see in many instances, that instead of fixing their minds wholly upon the evidence, so as to form an independent judgment upon its effect, they are watching the judge, in order to be guided by him? With the bench filled as it is at present, no evil is to be reasonably apprehended; and at all events the influence of the jury makes the judge careful, whilst there is every reason to believe that, with practice, our jurymen will improve; and as it would be absurd to abstain from going into the water till one had learned to swim, so it would be improper to withhold juries in criminal cases in which cases that mode of trial has constitutional advantages, until the people had acquired a fitness which can never come but by experience. But when I see so much leaning upon the bench in criminal cases, in which the jurors are from their circumstances more competent, and in conscience more obliged to form an independent judgment, I cannot doubt that trial by jury in civil cases would, in general, have no other effect than to allow the judge to give a verdict for which he was not responsible, except in the cases, perhaps many, in which some influence has made its way into the jury box which it would have been better to exclude. Considering the distrust of their own judgment in such matters which our country farmers entertain, and their profound respect for the judge's opinion, I can scarcely doubt but that the verdict of the jury would have been the verdict of the judge, or that, on the other hand, some undue influence was in operation. I come now to the second difficulty mentioned in the minority's report. Looking to the country districts of this Colony, to the truly curious extent to which the several families are intermixed by marriages and descent, the multiplicity of relationships, of which a genealogist might in vain attempt to get to the bottom, and the thinness of the population generally, we consider that it would be impossible to empanel a jury of boers to try any case between boers, in which some at least of the jurymen would not be so connected with one or other of the litigants as to make their impartiality suspected by the party against whom the verdict was returned. This objection has been set forth and explained in the

minority's report. It demanded, I conceive, to be observed upon by my hon. friend, being an important point, and one well meriting observation. It was also in evidence by several witnesses. But it appears to me that the majority, instead of looking the evidence in the face, instead of adhering to it to any extent, have made it but a starting post to run away from, and have come forward, in regard to jury trial in civil cases, with a proposition unsustained by the statements of the witnesses examined. Mr. Le Sueur, who was the first witness upon the point, thinks trial by jury would be beneficial in mercantile cases. Major Longmore would allow a jury to try commercial questions, and questions of a like nature, but, oddly enough, he would keep libel and slander for the bench, fearing, I presume, that juries would be too severe, and desiring to place the liberty of the press under more secure protection. The Chief Justice seems to leave the question of jury or not to the preference of the suitors themselves. Mr Justice Musgrave considers that upon certain questions of a commercial nature a jury might sit with advantage, but speaking generally, is not in favour of the principle as regards this Colony and its laws. Mr. Justice Menzies is entirely against the system. But lawyers may not be trustworthy witnesses. Turn, then, to mercantile men. Mr. Eaton says: "I think trial by jury in civil cases would be very beneficial (to a qualified extent). I think that if trial by jury were adopted in all civil cases it would entail an amount of inconvenience on the jurors that would be insufferable." I pray the Council to weigh this last remark. Summon jurors for all civil cases throughout the Colony, and the number annually required will be immense. If they are to be paid for their attendance, the costs of suit will be much increased. If they are to serve for nothing, there will be a great grievance to a great number, who will scarcely see why they are to lose their time and be put to expense for the sake of other people. This, however, is incidental. Proceeding with the witnesses, I come to some very proper observations made by Mr. Sutherland: "I think that in commercial cases and cases of account, trial by jury would be beneficial, and better than the present system of trying them before three judges without a jury. But I doubt whether, in this

community, a sufficient number of persons could be found to try the cases who have not heard the subject discussed out of court, and who consequently would go biassed into the jury box. The want of the English language I also consider a great drawback, and also that there is not a sufficient number of persons here capable of forming an opinion upon commercial matters." Mr. John Smuts states: "I am not an advocate for trial by jury in civil cases, not even in Cape Town; I prefer the trial of all civil cases by three judges. I should be sorry at present to see trial by jury in civil cases established. But in order to see the system tried, I should have no objection to see it introduced by means of special juries in particular cases, where parties require it. My reason for the objection I have to the question of trial by jury in civil cases is, that I think our population is not sufficiently large, and that they are too much connected with each other, and also that many of the petit jurors are dependent upon capitalists, and that it will work great inconvenience to the inhabitants to sit on such juries, to which they would object, as interfering with their ordinary business." My learned and esteemed friend and former predecessor, Mr. Daniel Denyssen, says: "In regard to the expediency of introducing the principle of trial by jury in civil cases, I feel the question to be one of great difficulty, but if I were to give my impression, I should say that, under the circumstances of this Colony, trial by jury in civil cases would not be likely to work so well as at present, unless, perhaps, in mercantile cases." Mr. John Coenraad Gie considers "that this community is not quite ripe for trial by jury in civil cases at this moment." Mr. Rutherford says: "In principle, I think jury trial is the best; but my idea is, that our community is too limited to allow us to expect that cases could be determined by jurymen, all of whom were completely unconnected with the parties, and unbiassed with regard to the subject matter to be tried." Mr. Gadney: "With respect to trial by jury in civil cases, I think it might be introduced beneficially in special cases, but not generally for all trials. I think there is not sufficient intelligence for that purpose. I also think that the large family connections here would create another difficulty with regard to such trials which might leave a bias for or

against the litigating parties." I have now gone over the evidence of all the witnesses, except two, who were examined to the point. I submit that the effect of the evidence is to induce care and caution, and a gradual advance, rather than a sudden alteration. But I admit that two highly respectable witnesses go the other way; one, a most intelligent gentleman, engaged in mercantile pursuits, and the other, in my opinion, as good a civil lawyer as any in this Colony (I speak sentiments I am well known to entertain, and have no temptation to flatter). I allude to Mr. Stephanus Watermeyer and Mr. Advocate Brand. The opinions of those gentlemen are entitled to much weight. But I do not disparage them when I say they cannot be allowed to outweigh the opinions of so many other most competent witnesses, and that the weight of evidence is entirely against their views. However plausible and however popular the advocacy of jury trial in all civil cases throughout the Colony may be, and I am aware that it is both, I put it to the Council whether the preponderance of evidence is not greatly in favour of the cautious policy of the minority who are disposed to introduce trial by jury at once in Cape Town, and afterwards extend it as fast and as far as circumstances will allow. My hon. friend quoted largely from the commissioners of inquiry. I am not prepared to say that their opinions upon this point are entitled to any extraordinary weight. I have heard the law report of the commissioners spoken of in the Colonial Office in London in a manner which induced me to believe that it was not there regarded as a very serviceable document. How far does my hon. friend go with the commissioners? They are against requiring unanimity, and think that a majority of two-thirds should give the verdict. I should like to know my hon. friend's opinion upon this very knotty but important point, a point intimately affecting the whole principle of jury trial. I am aware that much may be said on both sides. M. Arago, in France, has considered it on mathematical principles; Mr. Bentham, in England, has considered it on metaphysical principles; but be unanimity or a majority the rule to be established, I should have wished to hear the rule announced, in order to be able to discuss its probable effects. I imagine, however, that the

majority of the committee will dissent from the commissioners, and favour unanimity, in which case they weaken the authority which they quote. And let it be borne in mind, that after the report of the commissioners had been considered, the Charter of Justice was sent out, in which the recommendations of the commissioners were not embodied. I put the charter against the report, and submit that the former, framed after the perusal of the latter, is clearly entitled to the greater weight. But this is not all. The Secretary of State, in what we call the Judicial Dispatch, adverts to the subject. "The charter," says Lord Goderich, "contemplates the possibility that trial by jury might, hereafter, be properly established even in civil cases, and enables the Governor in Council to make provision for that purpose. It is scarcely necessary to remark that such a change in the law should not be introduced except with the greatest caution" (we have been much taunted about the word "caution" in our report) "and after the most mature deliberation with the judges of the court." Such were the views of the Secretary of State, writing with the report of the commissioners before him; and it does appear to me that they are both sound and judicious. The judges ought, upon a point of this nature, to be recognized as high authority. I do not, indeed, counsel you, in regard to this or any other question to put yourselves supinely into the hands of the judges, or surrender your right of deciding for yourselves, which were to abandon your duty; but I do counsel you to pay a most respectful attention to the views of the judges regarding the matter now in hand. I have now, Sir, stated everything that occurs to me in reference to the introduction of trial by jury in civil cases throughout the Colony, a measure which the majority regard as an important part of the system, and one the discussion of which formed, perhaps, the most striking, leading, and eloquent part of the speech of my hon. friend. The way is now cleared for the consideration of the main question on which we are divided, the great organic change to which I am opposed. And here I state at once that granting for the sake of argument all their evils, I am deliberately of opinion, that for every evil which their system would remove, it would substitute a hundred greater evils, and inevitably entail consequences of a most

injurious character upon the Colony at large. In the report of the minority, we have endeavoured to show how the proposed system would change the character of the present circuit courts, and change still more the character of the present Supreme Court; and have given our reasons for thinking that one court of three judges, sitting together constantly, communicating with each other, capable of correcting each other's deficiencies and peculiarities, having constant access to the records of the old court as well as their own, deciding in Cape Town, in the presence of a public comparatively intelligent, and of a bar, small indeed in numbers, and if measured by him who chances to be its head smaller in capacity, but still a bar not wholly incompetent to aid in the dispensation of justice, that such a Supreme Court furnishes securities for the intelligent, impartial, and uniform administration of law, which you will vainly seek to find in the system suggested in its stead; by which, instead of judges united in the way I have described, will be substituted five separate judges, placed in remote districts, and small communities, without a bar to assist or control, or any stimulus to extend their knowledge, or even to retain whatever law they may originally have possessed. My hon. friend has said that the public has no sympathy with the Supreme Court, a remark the justice of which I am not prepared to admit, for though no judgments ever please the losing party, I am not aware that the decisions of the Supreme Court have generally given dissatisfaction; but be that as it may, of this I am quite certain, that however small may be the public sympathy with the Supreme Court, it will be much smaller with any of the courts proposed by the majority, courts to be formed of local judges, exposed to local influences, who will soon sink in the estimation of their little neighbourhoods, and be regarded as mere village vendors of unsound law. This is my notion of the probable effects of such a change as is suggested, irrespective entirely of the particular nature of the law to be administered. But the nature of that law should not be overlooked. It is, and I presume is for some time to remain, the Roman Dutch Law. It is not a system of principles, like the Code Napoleon, though, by-the-bye, the authoritative commentaries on that code have nearly swelled into the bulk of the camel

loads which were digested by Justinian. It is not such a code as you might take from Mr. Bentham. It is a complete and elaborate system ; and where do you find it ? Preserved in two languages, Latin and Dutch. Pray tell me in what manner you expect that your district judge of George, or Worcester, or Graaff-Reinet, is to have his attention directed to any authorities couched in Latin ? Dutch, indeed, he may have quoted ; but is your district judge to be conversant with Dutch ? With agents who are ignorant of Latin, and judges who are ignorant of Dutch, I confess I anticipate with amazement, not unmixed with mirth, the manner in which some such questions as I have myself been lately arguing in the Supreme Court are to be discussed and decided in these country jurisdictions. But my hon. friend intends to go further, and to make the law easy. He has found out that our system of pleading is much too technical, that there is a great deal in it that serves no useful purpose, that in fact written pleadings are unnecessary, and that the judge should hear the parties state, orally, the nature of their dispute. And by way of a lively illustration, and in order to secure attention, I won't say to "attract an audience," he put the case of a cow distrained for rent, and certainly reduced the case to very narrow limits. "You took my cow," says the complainant, "I did," replies the defendant, "because you owed me rent." And so, says my hon. friend, you may drop the cow altogether, and confine yourself to seeing whether or not any rent is in arrear. But suppose the question to be started, by what law was the cow distrained ? Were the demised premises an urban tenement or a rustic tenement ? and is there a tacit hypothek in both indifferently, for rent in arrear ? In the Supreme Court we should refer at once to our great authority *Voet* (for I may observe, Sir, that no matter how much law a colonial lawyer may have in his head, he is certain to have much more in his *Voet*), and so perhaps, settle all these points, but I fear the Worcester agents might be gravelled with them. But to get on, we shall concede it to be settled that by some law, in fact by a law of nature, cows are distrainable for rent. But then, says the defendant, "I admit your hypothek, but you ought to have had the previous leave of the Court before asserting

it." The Worcester judge is late from England. He does not understand such practice, and is about to overrule the objection. "But the judge in the next circle holds the objection good." "That may be," replies the judge, "such may be the law in the next circle, but it is not law here; each judge, I hope, is to be at liberty to decide as he thinks proper." "Oh!" says the plaintiff, at last, "I don't owe the rent; I paid it." "Did I give you a written receipt?" asks the defendant. "You did." "Where is it?" "Why, it's at home, of course!" "Then you can't give parole evidence of its contents," urges the defendant. "Where do you find that law?" cries the plaintiff, "it is much too technical, I call upon the Court to let my witness prove the payment." The judge, perhaps, is puzzled; but my hon. friend comes to his assistance, and gives the puzzled judge—a jury of nine Boers, judges of law and fact, relying that their profound sagacity will relieve the case of all possible embarrassment. I throw these things out, to show that cases may not always prove so simple as they seem, and that even out of things which may appear, at first sight, free from difficulty, a number of unexpected points may arise. My hon. friend admitted, as I understood him, that an intelligent, impartial, and uniform administration of law was an object of the last importance. But he says that intelligence and impartiality are independent of localities, and that uniformity we have not at present got. I cannot admit any of these conclusions. I cannot admit that intelligence is independent of localities, because intelligence results from practice, from emulation, from regard to reputation, from the shame of being ignorant of what those who surround you feel that you ought to know. In regard to law, it is especially the case. It is a study which must be stimulated. A secluded student may live on literature; a retired surgeon may find pleasure in pursuing anatomical investigations; but no one ever heard of a lawyer, in England, who, except when urged by circumstances, ever sat down to delight himself with the term reports, or of any lawyer in this Colony, who, when the world without had wearied him, sought for solace in Voet's Commentaries *ad Pandectas*. The very idea of such a thing is

laughable. And believe me, Sir, that judges will be like all other lawyers ; and having little to do, and no auditory to which they could deliver a learned judgment without justly incurring the charge of pedantry, they will become careless of their professional attainments ; take, perhaps, to sheep-farming, and let their wits go “a wool gathering” when they should have them directed to doctrines of law. At present, things are otherwise. In the locality in which the Supreme Court is placed some stimulants are presented which are not, I think, without their influence. I think, for instance, that I do not arrogate too much for the bar when I say that our opinion of the manner in which business is transacted is of some consequence, and that no judge will, if he can help it, talk nonsense in our presence. So much as to the judge’s intelligence ; now as to his impartiality. The topic is delicate, and to be delicately handled ; but of this I am certain, that local jurisdictions have always been attended by this calamitous result, either that the local judge, living in a small society, has become subject to partialities and prejudices ; or what is nearly as bad, that he has been liable to be suspected of having become subject to them. Turn to history. Look at England. The whole jurisprudence of England was originally local. Six or seven hundred years ago, circuits were for the first time established, and since then justice, centralized in the Supreme Courts in Westminster Hall, has been administered upon a different principle from that which formerly prevailed. With what effect ? Upon this point I shall call some witnesses. The first shall be a writer of authority, himself a lawyer though not practising, a man not used to panegyric, but on the contrary a severe though impartial judge of men and institutions : “Henry the 2nd,” says Mr. Hallam, in his *Middle Ages* (the 2nd volume, page 463), “established itinerant justices to decide civil and criminal pleas within each county. This excellent institution is referred by some to the 22nd year of that prince ; but Madox traces it several years higher. We have owed to it the uniformity of our common law, which would otherwise have been split, like that of France, into a multitude of local customs, and we will still owe to it the assurance which is felt by the poorest and most remote

inhabitant of England, that his right is weighed by the same incorrupt and acute understanding upon which the decision of the highest questions is reposed." I shall now quote a man, not of the same calm and dispassionate temperament, but one whose talents fill a large space in the public eye, and who is, moreover, a distinguished legal reformer—Lord Brougham. In his law reform speech of 1828, that speech of eight hours' length (I am not, I hope, to talk as long without any of his talents), he thus refers to the Welsh judges : " They become acquainted with the gentry, the magistrates, almost with the tradesmen of each district, the very witnesses who come before them, and intimately with the practitioners, whether counsel or attorneys. The names, the faces, the characters, the histories, of all those persons, are familiar to them, and out of this too great knowledge grow likings and prejudices which never can by any possibility cast a shadow across the open, broad, and pure path of the judges of Westminster Hall." What was the language of the same eminent person in moving for leave to introduce his local courts Bill of 1830 ? " Let me not be misunderstood. I am too fully sensible of the great and manifest advantages which result from that arrangement which makes the capital the seat of justice, to attempt to alter it, even if I suppose that I could succeed in the attempt." When Chancellor, Lord Brougham afterwards introduce in the Lords his measure for creating local courts. It was opposed and lost. I give no opinion upon that measure ; but merely desire to observe, that instead of dismembering the courts at Westminster, the union and integrity of those courts, and their constantly controlling operation, was assumed by the advocates of local courts as an indispensable condition of their well working. The local judges were to have been paid £2,000 per annum, at home ; not sent out to a remote colony for £1,200 ; and notwithstanding that security for ability and integrity, the measure, as I have said, was negatived. Lord Lyndhurst, in the course of a most powerful speech against the Bill, availed himself of what he calls, and what I call also, the elegant language of Sir William Blackstone : " The very point of their being strangers in the country, is of infinite service in preventing those factions and parties which would intrude in every case of moment,

were it tried only before persons resident on the spot ; and as this constitution prevents party and faction from intermingling in the trial of right, so it keeps both the rule and the administration of the laws uniform. These justices, though thus varied and shifted at every assize, are all sworn to the same laws, have had the same education, have pursued the same studies, converse and consult together, communicate their decisions and resolutions, and preside in those courts which are mutually connected ; and hence their administration of justice and conduct of trials are consonant and uniform, whereby that diffusion and contrariety are avoided which would naturally arise from a variety of uncommunicating judges, or any provincial establishment." In the same speech there is an extract from Hale's History of the Common Law, to the same effect as the passage from Judge Blackstone. Read the instructive debate to which I refer, and you will find in the speech of Lord Brougham much of his wonted power of sarcasm, and in the speech of Lord Lyndhurst much sharp and bitter but strong argumentation, and in the speech of Lord Plunket not a little of his unostentatious force, but you will not find in any of them any support for the principle of a change which would separate judges of unlimited jurisdiction, and place them, up and down, in limited localities ; on the contrary, you will find a centralized seat of justice universally assumed to be a power, without which local courts could not, under any circumstances, be safely entrusted even with a restricted jurisdiction. Now tell me, I beseech you, what there is in this Colony, in the number of its population, in the limited society with which the judge must mix, what there is in this Colony, in which, as in all small communities, the great commandment is that you shall never believe your neighbour to be actuated by a good motive if you have ingenuity enough to devise a bad one for him, what there is in this Colony, I say, which induces you to consign the unhappy judge to become the victim of anonymous letters to the Colonial Office, of foul, low, petty, vulgar insinuations, of records tracing his judgments to the several places at which he dined out for the last twelve months, or to the different persons with whom he may have been seen shaking hands in the street, and to deny him the right of saying, "I sat

one of three, in the presence of the bar, of the public, and the press, and I call those respectable witnesses to silence all base backstairs imputations." You will point to the present judge of circuit.. But I hold the two characters to be distinct. The circuit judge is a mere bird of passage; he meets certain people, but only as a traveller; he forms no permanent associations, nor is suspected of forming them; he is altogether secure from the evils which beset the local judge. Again I say, look to the mother country. She commenced with local judicatures, she ended by centralizing the seat of justice, and she is little likely to retrace her steps. "Repeal the union," exclaimed Canning, "restore the heptarchy!" "Break up the courts at Westminster," it might well be said, "restore the county courts." No man, I care not what his talents, were they even greater, aye, ten times greater, than those of my hon. friend, could, in my opinion, on account of alleged length of imprisonment, or difficulty of transport, or any matter of a like nature, stand up in the House of Commons to propose placing the supreme judges in separate judicial circles with the slightest chance of obtaining a hearing. I have seen the House on one or two occasions in some excitement, and I can well imagine how the member's voice, and the Speaker's call of order, would both be drowned in the derisive shouts with which such a wild proposal would be sure to be received. My hon. friend has spoken of Hong Kong, and colonies with only one judge. But has he been able, after surveying, as I know he has done, the whole Colonial Empire of England to point out any one Colony in which there now exists, or has ever existed, such a system as he recommends? Where is the Colony in which, when you were giving it three judges, you did not centralize them in one Supreme Court? Much more, where is the Colony in which, having once centralized three judges in one Supreme Court, you afterwards proceeded to divide and localize them? With every variety in the law itself, you have remarkable uniformity in the machinery for its administration. There is scarcely a system of jurisprudence that ever has existed, which is not yet preserved in some Colony of England; old French law in Canada, modern French law in Mauritius, the Dutch law in one

place, the Spanish law is another, Hindoo law in some quarters, and in others, northern customs descended from the time of Odin ; but, in the midst of all these diversities, you find, I think, the machinery uniform, and invariably perceive, that when you have judges enough to form a strong court, you do not scatter them but unite them. Here is Clark's Colonial Law, look through its pages, or consult any other work you may prefer, and show me anything that resembles the plan proposed by the majority. You cannot do it. The plan is as yet unprecedented, and I trust it will be found that this Colony shall not become a precedent. But coming closer to the point of uniformity of decisions, it occurs to me to remark, that the present Treasurer-General of Hong Kong, Mr. Montgomery Martin, in his book upon this Colony, published some ten years ago, says in a foot note, that the inhabitants were then dissatisfied with the circuit court decisions, regarding which, it was observed, that two of the judges, being English, decided one way, and the third, being a Scotchman, decided another way. Is this against me ? Sir, it is for me, and that strongly ; because if ten years ago, or better, when the judges were new to each other, when they had but recently become fellow students, when they had not yet succeeded by mutual co-operation in correcting errors, the Colony was suffering from evils which it does not now complain of, the improvement must be traced to the action of the Supreme Court, and to the extent to which discussion in Cape Town has established principles that are recognized as precedents on circuit. But it would certainly be a strange way of counteracting that tendency to variety which arises from the fact that your judges are men bred under different systems of law, and which nothing but constant communication with each other, in the discharge of the duties of one court, can ever check, to set them down singly, at a distance from each other, and there to require each of them, sink or swim, to lay down such law as he is able. But my hon. friend wholly disputes the fact of uniformity as now existing, and points to certain sentences in criminal cases not in keeping with each other. The discussion of this topic is a matter of delicacy, and I shall not dwell upon it. The Swellendam

case, which my hon. friend referred to, I remember well, and believe that the apparent discrepancy could be satisfactorily explained. In regard to the Kafir cases, I offer no opinion. But this I say, that honest and good men may, from principle, have different standards for the admeasurement of punishment ; that this Colony is not the only place in which such different standards are found to be applied ; that you can scarcely take up an English newspaper without seeing some remark upon the severity of one judge's sentences as compared with the lightness of another's. But such varieties are, I admit, unfortunate. They perplex the ideas of the ignorant and confound the gradations of crime ; and I could wish for greater uniformity than apparently prevails. But while I make this admission, I contend that the state of things on which my hon. friend observed, instead of favouring his system, tells powerfully against it. For if, notwithstanding the opportunities which the judges now enjoy of comparing and correcting their notions, a considerable diversity of practice is found to prevail (chiefly in regard to the leniency of the young judge, as I have heard him call himself, Mr. Musgrave), within what limits do you expect to confine the diversity of practice which will prevail when the judges are separated instead of being associated, and when they will neither have the temptation, nor the opportunity, of saying the one to the other, "Your sentences, brother, are so light as to make mine seem too severe ;" or, on the other hand, "Brother, your sentences are so severe as to make mine seem too light," and so, perhaps end by striking a diagonal in which both shall coincide. My hon. friend sees here a decided advantage in his own plan. In his own circle Mr. Justice Menzies will be uniform, and in his own circle Mr. Justice Musgrave will be uniform also. But what sort of uniformity is that which condemns George and Worcester to opposite principles of punishment for ever ? What is gained by congregating at the convict stations men sentenced, in different circles, to different degrees of punishments for the same degrees of crime ? This is a want of uniformity more baneful while it lasts, and more likely to continue, than any which can be presented under the present system. But I now go farther, and ask, why it is that the scale of punish-

ments of different judges is found to be so various, while the decisions of the same judges in regard to civil cases are, in general, consistent? It is because the judge has, in regard to the scale of punishments, an unfettered discretion, while in regard to civil cases, he is controlled by fixed rules of law. But without a Supreme Court, which shall be a strong court, and an assisting bar, and constant comparison of legal principles, and frequent discussion, fixed rules of law will become things unknown; discretion will be substituted for them; and when, instead of the right line of law, which Coke praises, you measure with the crooked cord of private opinion, when you have introduced oral pleadings in local courts, where there will be none of the aids required for the preservation of the science of legal judgment, you will begin to find that foundations have been unsettled, and to perceive the same want of uniformity in the definitions of crimes and offences, and the law of debtor and creditor, as you now witness in regard to the meting out of punishment. Selden, writing against courts of equity, says that to make law of the Chancellor's conscience is as absurd as it would be to make a measure of the Chancellor's foot; one Chancellor has a short foot, another Chancellor has a long foot, and 'tis all the same, he asserts, with the Chancellor's conscience. This is a sarcasm, and a sarcasm inapplicable to that rigid system which in England they call equity. But it is not inapplicable to such a state of things as may be apprehended from such courts as the majority contemplate. The Chief Justice has a short foot, Mr. Justice Musgrave has a long foot, and it is quite possible, notwithstanding the honesty and ability of both, that separated from each other, they, as all other persons, may take widely different measurements of law. But my hon. friend may say, "The whole of your language is misapplied; I do not break up the Supreme Court; I merely separate its members." Let us not quarrel about words. What you call separating the five members of the Supreme Court, I call creating five local courts; and I apprehend that my language is the more correct. How will your annual assembly of three judges correspond with the present Supreme Court? What is that assembly but three of the five local judges, united only to hear appeals and new trial

motions ? The Supreme Court is now a court of first instance. All cases involving only law, all cases involving law and fact, where the facts are admitted, or are found on circuit, bankruptcy motions, provisional cases, all these, no matter from what part of the Colony they come, are now triable, in the first instance, in the Supreme Court. Will this be so by the proposed system ? Certainly not. By the proposed system the Supreme Court wholly ceases to be a court of first instance ; so that unless capitalists who lend their money on mortgages in the country districts, require their debtors (as of course they may) to fix their *domicilium citandi* in Cape Town, they must follow the forum of the defendant, as the attorneys in their petition have clearly pointed out. The administration of justice in the Colony will rest upon local courts, controlled only by a very unsatisfactory appeal to local judges, collected once a year. But if we are to go so far, why not go farther ? What think you of the plan of abolishing all courts except courts of the resident magistrates, and then once a year assembling five of those functionaries in Cape Town, and five in Graham's Town, to hear appeals ? You don't like that. You see no chance of preserving in such a system the principles of law. Nothing that could be urged about removing technicality, and allowing the parties orally to tell their stories to the magistrate, and about the corrective provided by the appeal, would reconcile you to such a plan. I am of the same opinion. But I do conceive that when you shall have clearly fixed upon the mischiefs which might be apprehended from such a scheme as I have suggested, you will have found, at the same time, reasons differing but in degree for doubting the safety of the plan proposed by the majority. My hon. friend has produced returns to show that appeals from judgment pronounced on circuit are but few, and he thence infers that appeals from the new courts would be but few likewise. If they should be so, so much the worse, because such a fact, instead of convincing me that the local court was satisfactory, would convince me that the appeal court was not looked to with confidence. The rarity of appeals from circuit is easily accounted for. Questions of law, the circuit judge reserves for Cape Town whenever they present novelty or difficulty. And

the circuit judge, moreover, carries with him the knowledge which this Supreme Court practice is calculated to create or keep alive. Where the law is certain, appeals are rare. Lord Lyndhurst, in his speech on local courts which I have already referred to, says that Preston, the conveyancer, gave in twenty years 40,000 opinions, not 1 in 30 of which ever came in any way into question in the way of litigation. How was this? Because, infinitely complex as English jurisprudence is, an English lawyer knows that he may give opinions carrying authority, and that but little depends upon the particular judge. Even in this Colony, something of the same kind is experienced. I am not prepared to say that I myself, to say nothing of better lawyers, might not, were I so inclined almost double the illiquid cases of the Supreme Court, by giving encouragement to parties who consult me. But an advocate can yet say, with some degree of confidence, "The law is settled, you have no case; if you go into court you will lose your money." It is better, as has been often said, that the principles of law should be settled, than that they should be sound. Once render them uncertain, by establishing separate courts of low legal character, and no man can advise, until he knows what judge is to try the case,—a state of things in which the preventive check upon litigation which now exists must be in a great degree withdrawn. The court of appeal proposed by the majority of the committee inspires me with no confidence, for no court of appeal can remedy half the mischief which may be done by defective courts of first instance. The facts will be ill found, and yet nothing capable of being proved may be sufficient to obtain a new trial. The law will be ill given, and yet, in the general uncertainty, no man may wish to risk the costs, and abide the delay, and endure the anxiety of appealing. And I am not without some apprehension that these local judges, not knowing how soon their own decisions may be called in question, will be exposed to a strong temptation to sustain each other's judgments, that an *esprit du corps* will arise amongst them, and it will come to be understood that if I support your law to-day, you will, in turn, support my law to-morrow. I see so much danger in the principle which I have discussed, that scarcely any saving in expense

would reconcile me to it ; but let us now see how stands the matter of expense. My hon. friend gave a comparative estimate of his system as compared with ours, which shewed a balance in his favour of £7,000 and upwards. I am wholly sceptical as to the accuracy of that estimate, and have in turn made out two tables which, as it appears to me, will be found to come closer to reality. Some items in the tables of my hon. friend are obviously erroneous. Agreeing to the position laid down by us, that all reductions equally competent to both systems should be excluded from each, he yet charges me with £2,000 for a Chief Justice, and himself with only £1,500, forgetting that the salary need not be higher in the one than in the other. In the same manner, he charges us with £1,500 instead of £1,200 for one of our puisne judges. Again, he debits me with £1,803 for the charge of summoning jurors and witnesses, and charges himself with nothing. He says he will do this work with the police ; but if so, so can I ; or rather, as I pay the sheriff for doing that work, I can dispense with two policemen, and so diminish the police charge, without impairing the real efficiency of the force. Without going through all the items, but referring generally to Mr. Menzies' letter and tables for explanation, here are the tables to which I refer :—

System of Majority.

Chief Justice	...	...	...	...	£1,500	0	0
4 Circle judges	...	...	...	...	4,800	0	0
4 Deputy sheriffs	...	...	...	...	1,000	0	0
4 Crown clerks	...	...	...	...	1,000	0	0
5 Registrars and judges, clerks (<i>vide</i> table 2 of Mr. Justice Menzies)	...	...	...	...	600	0	0
Transport and personal expenses of four crown clerks (<i>vide ditto</i>)	...	...	...	...	330	0	0
Transport and personal expenses of four judges and four registrars (<i>vide ditto</i>)	...	...	...	...	2,190	0	0
Transport and personal expenses of four deputy sheriffs to travel with circuit (same as crown clerks)	...	...	...	...	330	0	0
House rent for judges in circuit town (<i>vide</i> table 2 of Mr. Justice Menzies)	...	...	...	...	300	0	0

Expenses of two judges to form court of appeal	£300	0	0
Expenses of witnesses (say $\frac{1}{4}$ less than at present)	1,200	0	0
Provisions, &c., of prisoners in gaols (say $\frac{1}{3}$ less than at present)...	1,530	0	0
Removal of prisoners	300	0	0
Inspectors of police (30) at £100	3,000	0	0
90 Constables for ordinary duty	} at £40	6,000	0 0
60 do. for serving summonses, &c.			
Forage allowances for 30 constables	} at £25	2,250	0 0
for ordinary duty...			
Ditto ditto 60 serving summonses, &c.			
		<hr/>	
		£26,630	0 0
Deduct for civil process to be executed by the police, and fees paid into the treasury	...	3,766	0 0
		<hr/>	
		£22,864	0 0

System of Minority.

Chief Justice ...	£1,500	0	0
2 Puisne judges ...	2,400	0	0
3 Clerks and circuit registrars, at £150 ..	450	0	0
Transport and personal expenses of judges, &c., on circuit, per annum (<i>vide</i> table No. 6 of Mr. Justice Menzies) ...	1,770	0	0
Repairs of wagons, do. do. ...	100	0	0
Expenses of witnesses ...	1,607	10	0
Inspectors of police (30) at £100 ...	3,000	0	0
90 Constables at £40 ...	3,600	0	0
Forage allowance for 30 constables at £25 ...	750	0	0
Conveyance of record books ...	37	10	0
Provisions, &c., of prisoners in gaols ...	2,295	0	0
Removal of prisoners ...	600	0	0
Circuit court prosecutor ...	1,000	0	0
Summoning jurors and witnesses ...	1,803	0	0
	£20,913	0	0

In round numbers, I conceive that the system of the minority, in its actual working, would prove cheaper than that of the majority by somewhere about £2,000 per annum ; but I do not profess to be a very accurate reckoner, and may, therefore, be shown to be inaccurate. How then, Sir, upon the whole is my mind affected in reference to the several plans which have been agitated ? This I shall frankly state. I conceive a Supreme Court of three judges, performing two circuits annually as at present, to be the best system that, all circumstances considered, can be devised. No voice has outside this room been raised against it. My hon. friend, or to speak more properly, the majority of the committee, seem to reverse the usual process, and to conclude that the system should be abolished unless some strong manifestation in its favour shall be made. But as my hon. friend beside me (Mr. Ebdon) remarked already, it is not customary to agitate for existing institutions. It is considered that in politics, however it may be in morals, Pope's saying, "What ever is, is right," is a sound sentiment, so as to throw upon those who called for change the proof of its expediency. We apprehend that the agitation should come, if at all, from the other side. But how stand the facts ? The judges are all against you. The Colonial law officer, no man can think more humbly of the individual than I do, but still the Colonial law officer, and three other members of this Council, whose opinions are entitled to far greater weight, form the minority. The attorneys have sent in a well-considered petition, in reference to which my hon. friend had a very fair fling at the lawyers, and a very discreet one too, since it was much easier to suggest that they were interested than to answer their arguments. The capitalists have petitioned against the change, and the merchants have joined them. Who have petitioned in its favour ? Not one. The five respected friends who sit before me, without any backing from abroad, devise a most sweeping innovation, and, relying upon their own judgments, oppose themselves to the general opinion so far as that opinion has been expressed. If we were petitioned in favour of the proposed change, I will not say that I would therefore sacrifice my own convictions, and destroy what is established ; but when the process is reversed, and we are petitioned not to

make the proposed change, it does, I confess, appear to me extraordinary that the matter should be pressed forward as we find to be the case. But as I have said, Sir, I am for the present system, deeming it the best. Should it however be considered by others, though not by me, that what is due to untried men demands more frequent gaol deliveries, I should regard the next best system (not that I recommend it) as being the restoration of the fourth judge to the Supreme Court, the reduction of the terms to three, and the increase of the circuits to three also. Such a change would, indeed, be unfavourable to the judges. It would send each a circuit once every sixteen months, instead of once every eighteen ; and would, besides, throw one of the circuits into a very unfavourable season of the year. I should regret to cause such inconvenience ; but, at the same time, I would be prepared to cause it, for the sake of combining with more frequent circuits the preservation for the public of an efficient Supreme Court. Farther still. With all my dislike of local supreme judges, and I dislike them greatly, I must needs have recourse to them, should it be decided in the proper quarter that there must be four general gaol deliveries in the year ; and then, in a choice of evils as I regard them, I prefer to the plan of the majority, the plan improperly called the judges', by which a judge should be placed at Graham's Town, and another at Graaff-Reinet, who should, together, make four circuits of the Eastern Districts, annually ; leaving the three judges of the Supreme Court to make four circuits through the western division. I prefer this plan to the plan of the majority, because it will not be more expensive, and because it keeps open, what the other does not, a real and not a nominal Supreme Court, to which all suitors who please may resort in the first instance, and to which suitors in either of the two local courts may have recourse without delay, in order to correct or control the proceedings in those inferior tribunals. But I have said that I do not advocate this system, which, while it overcomes some of my difficulties, does not overcome the grave and serious difficulty of localizing single judges, of unlimited jurisdiction, in places where they would not be likely to retain the confidence of the public. And now, Sir, I conclude. I feel that I have exhausted

myself, and I fear the Council also. Very defectively, I am aware, and in a manner far below the exigency of the argument, I have striven for the preservation of the most important institution in this Colony, its Supreme Court, and contended against organic changes not prompted by public opinion, or public policy, or the practice of any other British Colony. Do not peril a matter of such moment for the sake of the evils which you propose to remedy, evils which may be greatly, if not entirely, abated, without rashly removing land-marks in the manner you propose. A political philosopher has profoundly said, that all that constitutes the pomp and power of the Government of England, her crown, her army, her navy, her parliaments, and her statesmen, serve after all for little else than to enable her courts of justice to arbitrate between man and man. Whatsoever, then, strikes at an intelligent, impartial, and uniform administration of justice, wounds the body politic in the very apple of the eye. Reverse the process of civilized societies, abandon the principle of centralizing the supreme seats of justice, localize your judges in remote and obscure villages, and unintentionally but inevitably you will deal the administration of justice a deadly blow, to become aware, perhaps, that the life of the law has been taken, by finding when too late that corruption has set in. Let the majority, then, be content with the claim to courage which they have already strikingly established in reference to this question, and not continue to press onward to its disastrous consummation a project, the ultimate effects of which I cannot persuade myself that they as yet fully estimate or even clearly foresee. Impressed, Sir, with these sentiments, I now move :—

1. "That in the opinion of this Council, an increase in the number of resident magistrates will be found sufficient to supply the principal defects in the present system of administration of justice in this Colony.

2. "That this Council will be prepared to abridge the period of confinement of prisoners before trial, by every means consistent with the preservation of the constitution of the Supreme Court.

3. "That the hardship of previous confinement is much aggravated by the disgraceful state of the greater number of our public

prisons, which in the opinion of this Council should be repaired and re-modelled as speedily as the colonial finances will allow, in such a manner as to obviate the necessity of using fetters at night as the only means of preventing escape ; and to permit the classification of prisoners, as well as the complete separation from persons charged with the crime, of any witnesses whom it may be necessary for the ends of public justice to detain.

4. " That in the opinion of this Council, it will be expedient to obtain the means of transport required by all branches of the public service by contract, instead of impressment, except in such cases of emergency as may imperatively require a deviation from the general rule.

5. " That pending the completion of arrangements for supplying transport for the public service by contract, the existing tariff should, in the opinion of this Council, be re-modelled, so as to raise the scale of remuneration in all cases where it shall seem to be fairly required.

6. " That no project for lessening the period of confinement before trial, or cheapening the cost of transport for the judges, by substituting Government wagons and horses for those obtained by impressment or contract, which project shall involve the organic change in the existing constitution of the Supreme Court recommended in the report of the majority of the judicial committee, could, in the opinion of this Council, be adopted without entailing evils infinitely more serious than any which it was intended to remove.

7. " That to abolish the Supreme Court of three judges, as at present constituted, in order, by adding two to the present judges, to create five widely separated local courts, to which all suitors must in the first instance resort, subject only to an appeal to three of those local judges annually assembled, would, in the opinion of this Council, soon be found to have shaken public confidence in the intelligent, impartial, and uniform administration of law, and moreover to have entailed upon suitors much practical inconvenience and expense.

8. " That should Her Majesty's Government consider more fre-

quent gaol deliveries to be necessary, this Council will be prepared to support the plan of adding a fourth judge to the Supreme Court, in order that thereby there may be performed three circuits in a year, or any other plan, even less desirable, which shall be consistent with the preservation of a Supreme Court of three judges, to be at all times open to such suitors as may bring the cases there in the first instance, as well as to such suitors as may wish to have recourse to it to regulate or correct without delay the proceedings of inferior courts.

9. "That while this Council is of opinion that the circumstances of the country districts are not such as to make the immediate introduction there of jury trial in civil cases expedient, it is at the same time of opinion, that the time has come when that mode of deciding issues of fact should, as a commencement, be adopted in the Supreme Court in Cape Town, from whence, if found to meet the wants and wishes of the public, it may be extended to other portions of the Colony.

10. "That without entering into any details of the proposed new system of police, this Council is of opinion that it will be found highly inexpedient and detrimental to the public service, to interfere in the manner contemplated by the majority of the committee with the useful and long-tried office of field-cornet."

Let me, Sir, add but two words more. Confining myself to the leading features of the report of the majority, I have not touched upon the question of abolishing the clerks of the peace, which may not yet, perhaps, be deemed to be decided, and respecting which I confess that I am still harrassed with recurring doubts and difficulties. Should I feel it necessary, I shall hereafter take an opportunity of fully considering this interesting question, as well as the equally interesting question, which is referred to in my last resolution, I mean the utility and importance of the office of field-cornet. At present, I have neither time nor strength for the discussion of these matters; and expressing my hope that I have said nothing improper or unjust, and desiring that any expression which may be thought to have exceeded the bounds of fair debate may be considered as withdrawn, I sit down, having performed as I was able, what I felt to be my public duty.

1846.

AS CHAIRMAN AT THE BANQUET TO SIR
BENJAMIN D'URBAN.

[*April 4, 1846.*]

ON THE PORTUGUESE ALLIANCE.

The CHAIRMAN said :—Gentlemen, the next toast upon my list, is Her Most Faithful Majesty the Queen of Portugal. Gentlemen, the Portuguese alliance is the oldest and the closest that Great Britain has ever formed upon the continent of Europe. It dates from a period even more remote than the accession of the House of Braganza to the throne of Portugal. Through good report, and through evil report, it has been religiously observed. It is an alliance always popular with Englishmen. It deserved to be so. The seamanship of Portugal is widely celebrated, and ought not to be forgotten here, when it is considered that a Portuguese sailor was the discoverer of the Cape ; and the soldiership of Portugal, besides being well known to, and highly appreciated by, our distinguished guest, is memoried by the bones of her brave sons which whiten on many a plain between Torres Vedras and Thoulouse. You will, I doubt not, gladly do honour to the Queen of an ancient and gallant nation, and our Queen's firm ally. Gentlemen, the tribute of respect which you so freely pay will, I hope, call up a gentleman well qualified, from his characters and talents, to represent his sovereign in this or in any other place. Gentlemen, Dr. Moniz has, in his absence, and without any solicitation upon his part, been chosen by the suffrages of Madeira to represent in the Portuguese Cortes that beautiful and important island, and the circumstance is, I fear, to flattering to allow him to decline the honourable, but certainly

most arduous appointment; a circumstance which for our own sakes I regret, because so much learning, urbanity, and gentlemanly feeling can but ill be spared from our limited society. But when he shall depart for the more stirring scenes of public life, he will, I am certain, carry with him our best wishes, as well as our conviction, that by efficiently serving his country he will faithfully serve his Queen, whose health without further preface I now give you,—“ Her Most Faithful Majesty the Queen of Portugal.”

ON SIR BENJAMIN D'URBAN.

The CHAIRMAN said :—Gentlemen, I rise to give you the toast of the evening, the name of the man in whose honour we are now assembled. In discharging, inefficiently I fear, but discharging as I can, that gratifying duty, I persuade myself that I shall best consult your wishes and the manly taste of our distinguished guest, by avoiding everything that might appear at all exaggerated in sentiment or in language. How this large company comes to be assembled, is soon told. When it became known that Sir Benjamin D'Urban was about to leave the Colony, a strong desire was manifested in many quarters, that he would allow his friends to evince, in such a manner as the present, the feelings which they cherish towards him. My hon. friend right opposite, your vice-chairman (Mr. Ebdon), catching and carrying out the public sentiment, called a meeting, by which certain of us were deputed to wait upon Sir Benjamin, to tell him what our hopes were, and express our trust that he would not disappoint those hopes. The mission prospered; we came, we saw, and I am glad to say, we conquered. A nature that utterly abhors all ostentation or display, and habits which lead him not to seek, but to shun, scenes of public exhibition, were found to present no obstacles, for he entered at once into the motives by which his friends were animated, and, yielding to a good man's reluctance to check a gush of good feeling, he granted our request, and so he sits, an honoured guest amongst us. Gentlemen, I must have leave to say that the strong muster

now before me is creditable to Cape Town and its vicinity. You are not assembled here for any selfish purpose, nor for any factious purpose of mere festivity; but you are assembled here to show that gratitude is not an empty name amongst you, and to do homage to the noblest work of God, an honest man. Politics this evening we have none, save, indeed, those lofty politics, the noblest far of any—older than all party names, and destined, I trust, to live when all party names shall be forgotten—politics which teach us that eminent services and stainless character are the best elements of national glory; politics which teach us that it is the truest patriotism whenever you meet a man of heroic mould to honour him. Did we come here to promote any sinister purpose, did we come here to sound the shibboleth of a party, did envy, or hatred, or malice, or any uncharitableness, enter into our objects, then, gentlemen, well I know we must have come here without our guest. Why do I say this? Because his life for the last eight years is before me, and because he that runs may read its lesson. In 1838 he yielded up the Government of the Colony, under circumstances which profoundly touched the general mind, and passed into private life, deprived, indeed, of the outward badges of authority, but not the less on that account, nay, the more on that account, the most powerful man in the community. How did he use his power? A man made of inferior metal giving way to what he might conceive, or christen, a just resentment, might behind the scenes have fostered faction and cabal, and used his influence to thwart and harrass his successor, and defeat or dash his councils and his measures. A man made of inferior metal, while avoiding this error, would have held superciliously aloof from his successor, and taken a paltry pride in parading an ostentatious abstinence from all matters of public concern, when requested as a favour to advise about them. Was such the metal of which your honoured guest was made? Let those bear witness who, as I do, know the facts; let those bear witness who know that advice or information was never asked that it was not given in the frankest and most cordial manner; let those bear witness who in this very room, just two years ago to-morrow, heard Sir

George Napier, in his own earnest manner, publicly proclaim that he did not forget, that he could not forget, that to the latest hour of his life he never should forget, the noble, disinterested, and unostentatious generosity of spirit manifested towards him at all times, and upon all occasions, by Sir Benjamin D'Urban. Gentlemen, I will not degrade that noble generosity of spirit by talking about tact, and discretion, and hitting a happy medium, and the like. Tact and discretion are doubtless good where there is nothing better, and so is the calculation that can hit a happy medium; but there are things far higher and nobler than these, things of which these are but the poor apes and mimics, things that draw lines where these after all make blots,—the soul of a soldier and the feeling of a gentleman. By such has your distinguished guest been governed in life from first to last. He came to this Colony no tyro in either war or politics, but a veteran in both. In that great struggle, of which Dr. Moniz has already spoken, Sir Benjamin D'Urban bore, as you have been told, a leading part. To him, I believe, as Quarter-Master-General of the Portuguese army, may in no small degree be attributed the organization and efficiency of those fine troops, who went shoulder to shoulder with our countrymen through the Peninsula, and assisted to roll back upon Napoleon and his gallant Frenchmen the tide of conquest. He has mentioned to me, since we sat down, that he was never a day from duty on account of ill-health; nor did he ever ask leave of absence; and it so happens that he was present in most of the great Peninsular battles. My friend, Baron Lorentz, who bore at Albuera the colours of the Fusileers until struck down by the "iron tempest," as Napier the historian, in the grand Homeric battle piece which shows for ever that memorable fight, calls the terrible French fire,—the Baron, I say, knows that Sir Benjamin was there, and knows, as every man who fought there knows, how much his services contributed to victory. As long as British soldiers shall revolve the events of that great period,—and they will incessantly revolve them,—so long will the battle of Salamanca be remembered, and the name of D'Urban be associated with triumph. Gentlemen, it must have been an awful sight to behold—while Wellington was in retreat—two great armies,

in a level and open country, moving in parallel lines, in full march, and often within half-cannon shot of each other, each waiting for some favourable moment when some mistake of the adversary might give an opportunity to strike. That moment came, when Marmont, trusting to superior numbers, and determined to bring the allies to action, rashly extended his left, discovering a weakened part, at which then dashed the Cavalry Brigade, led on by General D'Urban, with such suddenness and success, that the whole French army was overthrown, from left to right, and night alone preserved it from complete destruction. Gentlemen, the conspicuous services rendered by our gallant guest on that important day were not unnoticed, either by his great captain or his companions in arms. From the very battle field that night, an officer whose health I am to give you presently, Sir Henry Hardinge, wrote an account of the victory to a brother officer at a distance. I hold in my hand an extract from that letter, which I shall read to you. How I came to have possession of it may surprise you, and will, I have no doubt, even more surprise our distinguished guest ; but, leaving that in mystery, I shall read it, and, brief as it is, I pray you to note its nature well. "Our friend D'Urban," writes Sir Henry, "led on the Brigade with that intelligence and bravery which always ensure success ; and he has added to his merit as a staff officer an executive reputation for conducting troops in the field which alone was wanting to complete his military character." Such, gentlemen, was your guest considered as a soldier. But peace hath her victories no less renowned than war, and these also has he contended for and won. He was called from a most successful administration of the Government of Antigua to assume that of Demarara, at a time when the latter was surrounded with difficulties of no common magnitude, and there, by wisdom, by temper, and, above all, by even-handed justice, he succeeded in moderating between classes an interest that had long been hostile ; and finally left Demarara loaded with evidences and testimonials of its gratitude. At length he came to the Cape. His story here I need not recount, the Colony has it by heart. It may be read in the respect and affection with which he is ever named in public and in private, in

the interest taken in everything that concerns him or his, in the alacrity and enthusiasm with which you have rallied round him on this occasion, in the disappointment which is felt that these walls are not wide enough to admit a greater throng of friends. Gentlemen, he is not reaping where he sowed not, nor gathering where he did not straw. Though his administration of the Government had ended before my arrival in the Colony, I have had abundant opportunities of knowing his assiduity in business, and his untiring zeal in the performance of all his public duties ; while, with regard to his discharge of all his social duties, I may truly say that by the absence of everything hard, or unfeeling, or indicative of a want of sympathy with his fellow men—by a happy way of doing a kindness as if he was paying a debt instead of creating one, and by a temper which led him to take that concern in the interests of others which most people reserve exclusively for their own—he endeared himself to all ranks and classes, so that his name is rarely mentioned in private companies without bringing out the story of some benefit done, or intended, for those who needed it, by a paternal Governor, who felt for the colonists as for his children. Then came times of trouble and danger, encountered with a promptness, an energy, and a success, to be expected from a man of his high reputation and proved ability—followed by measures which I will not now discuss, but of which it would be base injustice to suppress the fact that the vast majority of the Colony deem them to have been wise, that all without exception believe them to have been honest, that they betokened a mind accustomed to take large views, and evinced a courage which, careless of personal consequences, shrank not from dealing with large questions in the manner which a sense of duty dictated. Gentlemen, I speak, I trust, in the spirit of history, and not in the spirit of controversy or debate, from which I am withheld by a feeling of what is due to you, of what is due to myself, and above all of what is due to our illustrious guest. Gentlemen, to the temper in which deprivation of office was endured, a temper equally removed from stoical indifference and theatrical parade, I have already incidentally adverted ; and now, after a twelve years' residence amongst us, he is about again to visit England. Twelve years, gentlemen, is a large segment of the ordinary circle of human life, and such spaces rarely

pass without bringing with them their griefs and their bereavements and of these our honoured guest has borne his share. But amongst his bereavements he certainly has not to reckon the loss of any portion of the public reverence, which year by year has only struck its roots deeper and deeper, and thrown out its branches wider and wider. This meeting is but a small portion of the fruit of that great tree. Sir, we thank you for coming here to-night. We rejoice that God still blesses you with those great blessings, a sound mind in a sound body, and that your faculties and frame, after all your long services, are as vigorous as ever. We entreat you to believe that the heart of the Colony is beating in this room, and that its throbs are throbs of kindness towards you. The acclamations with which your health will be received will be no empty sounds, but sounds with souls in them ; and out of doors they will be re-echoed far and wide. And now, gentlemen, repressing your enthusiasm no longer, I give you the man with troops of friends, and with no enemy, the accomplished soldier, the paternal Governor, the knight without fear and without reproach, the gentleman in word and deed, Sir Benjamin D'Urban.

ON THE GOVERNOR.

The CHAIRMAN said :—Gentlemen, I rise to give you “His Excellency the Governor.” In doing so I shall be very brief. An elaborate panegyric pronounced by the Attorney-General upon the Governor might sound suspiciously, and I shall pronounce none. He needs, I think, no praise of mine. His character is established. He is a man, if I rightly understand him, who has much pondered on the meaning of the term Duty, and has thoroughly mastered that hard word. I need not tell you that he who has done that is raised so high above the common earth that he can look down on many things. His military services, his Canadian administration, his command in India, his manner of losing that command, these are matters that another in my place might touch on with some interest. For myself, I shall say no more of this : that I believe this Colony is now ruled by a man whose heart's desire is, to rule it well. I give you His Excellency the Governor.

ON THE ARMY.

The CHAIRMAN said :—Gentlemen, our next toast is the Army. When I was at school I was whipped, as an elocution lesson, through Pulteney's speech against standing armies ; and to me, as to him, a standing army was a terrible thing. Gentlemen, I have lived to change all that. The liberties of England have never been threatened by the gallant army maintained for her defence ; and nothing can be more certain than that every good soldier is, in the truest sense, a good citizen. Long may the country be proud of the great actions and high character of her troops, of the reverence for law and order which they discover in times of peace, and of the might and majesty with which, when the trumpet sounds, they move to battle. Gentlemen, I give you the Army.

ON THE NAVY.

The CHAIRMAN :—My friend, Mr. Justice Menzies, at Sir General Napier's farewell dinner two years ago, gave from this chair, " Britain's right arm, the Navy," and then immediately afterwards " Britain's other right arm, the Army." I remember the expressions because they pleased everybody very much, and myself so greatly, that I deeply regretted, for his own sake, that the utterer of so happy an Hibernianism had the misfortune after all to be only a Scotchman. But, gentlemen, we will now, with all honour, drink that noble service—the British Navy ; that service so rich in stirring recollections and in illustrious names ; that service in thinking of which every Briton feels, as it were, a sensible enlargement of the heart ; that service which preserves the sacred soil of England free from the pollution of every foreign foot, by commanding the waters that surround her shores,—

Where Ocean, mid his uproar wild,
Speaks safety to his Island child.

Gentlemen, the Navy.

ON SIR H. HARDINGE AND THE ARMY OF INDIA.

The CHAIRMAN :—Gentlemen, I am now to propose to you, “Sir Henry Hardinge, and the army of India.” At any time, and under any circumstances, and setting aside everything but sympathy with the old friendship of two old friends, the friends of Sir Benjamin D’Urban would be prepared to receive with favour the name of Sir Henry Hardinge. The respect and esteem which Sir Henry has never failed to testify for our excellent guest (of a nature not common in these latter times), is characteristic of a warm and generous nature; while the heartfelt sincerity with which those feelings are returned by Sir Benjamin, are well known to all who know him. Therefore, were Sir Henry Hardinge comparatively an obscure man, were his name and services, instead of being public property but little known to us, we should still be glad to drink his health and wish his happiness, because we should be glad to do anything to gratify our guest; and because we are sure that a compliment to so true and tried a friend as Sir Henry Hardinge would gratify him very much. But, gentlemen, the toast needs not to stand on any such foundation. By eminent services, military and civil, by gallantry in the field, by sagacity in the Council, by rare capacity for the conduct of affairs, Sir Henry Hardinge raised himself through various grades of office to a position so conspicuous, that when very peculiar circumstances demanded very peculiar qualifications, the eyes of the Government and the public turned towards him, and he was nominated to fill what is certainly the most splendid, and is probably the most important, office in the gift of the British Crown, the Governor-Generalship of India. Gentlemen, it may I believe be safely said that no ruler ever went to India more impressed with the desire of cultivating the arts of peace than Sir Henry Hardinge. To administer, to regulate, to improve, in a word to govern an Empire won for England by a long succession of illustrious soldiers and statesmen, he regarded as sufficient for him. Of military glory he had had enough. More extended territories he did not covet. He saw that our Indian Empire had rapidly

reached a mighty size, and he knew that nothing but a sound internal administration could consolidate into the strength of the oak what had grown up like a gourd. The Hindoos have a wild legend which relates how Brama was once incarnate in a little fish that lived at first in a crystal vase, but grew too large for that, and was placed in a wide lake, but grew too large for that, and was transferred to the mighty Ganges, but grew too large for that, and had room at last only in the boundless ocean ; and in some such manner, and by fast degrees, has swelled, and swelled, and swelled again, our Great East Indian Empire. Gentlemen, Sir Henry Hardinge has evinced an anxious desire—some may even think an over anxious desire—to avoid everything like an aggressive policy ; but he is a soldier, and an Englishman, and he has yet one arm left to serve his country, and he will not suffer violence any more than he would offer it, and he will teach turbulent and faithless neighbours that where the British standard is planted for protection foreign domination shall not come. Gentlemen, since the death of Runjeet Singh, the old Lion of the Punjaub, who, however terrible towards others, always crouched under the great eye of England, that country has presented an unchanging scene of disorder, massacre, and misrule, and recently the Seiks, in time of profound peace, without provocation, and in violation of treaties, have crossed the Sutledge in great force, and those regions have again become the theatre of war. Gentlemen, it is impossible to contemplate without interest and pride what the Army of India has achieved on both sides of the Indus during the last four years. We can all remember how heavily upon the nation's heart fell, in 1841, the disasters of Cabul. A whole army was destroyed ; Sir William Nott, a hero now no more, was menaced in Candahar ; Sir Robert Sale, another hero, also gone, was besieged in Jellalabad ; English ladies were prisoners in the hands of the Afghans ; the opinion of our invincibility was shaken, and to shake that opinion is to shake our Empire. But the gloom was transient, and the clouds soon cleared. With a celerity and vigour that reflect credit upon all concerned, the resources of our Indian Empire were organized. A brave officer at the head of a brave army pushed across the Indus,

forced the terrible Khyber Pass, relieved Jellalabad, and, overcoming many difficulties and a fierce resistance, planted the British standard in triumph on the Bala Hissar of Cabul. That officer was Major-General Sir George Pollock. Gentlemen, to a man who has been honoured with the thanks of Parliament; who has received from his sovereign the Grand Cross of the most honourable order of the Bath, which your distinguished guest also has worn and wears, and who, higher yet, enjoys the consciousness of having done his duty, our humble meed of approbation could bring no additional renown; but I regret that the loss of a brave son, who following in his father's footsteps fell fighting in the late action, and as yet but feeble health, have prevented Sir George Pollock from meeting Sir Benjamin D'Urban upon this occasion, as we know from him self he would otherwise have gladly done. Gentlemen, 1843, as well as 1842, was found pregnant with great events upon the Indus. The glories of Clive and Wellesley, of Plassy and Assaye, were equalled or eclipsed at Mcanee and Hyderabad, when Sir Charles Napier, notwithstanding a startling disparity of force, trusting to his own sublime heroism and resolution and the steadiness and determination of his men, broke the strong Beloochee power, and added Scinde as a province to our Empire in the East. And now, further up the great river, the army of India is contending in the Punjaub. Two great battles have been fought and won. They have indeed been purchased by the blood of the brave. The fine, frank, open-hearted veteran Sale is down, and has widowed a lady whose Roman fortitude and courage, so widely celebrated, now meet, and I trust equal, their greatest trial. In the long list of the dead we read tidings which will carry mourning into many a home and many a heart in England. But they have died as soldiers are prepared to die, and have proved again, what was often proved before, that not inequality of members, not disadvantage of position, not inferiority in metal, not the fatigue of forced marches, not the sharp pangs of hunger, not the raging of intolerable thirst, can repress the noble ardour of our Indian army, or enable any enemy throughout the East to sustain themselves against its never failing bayonets and its

well directed fire. Gentlemen, of the issue of the struggle in which the Indian army is now engaged, no reasonable doubt can be entertained. It would doubtless soon be called to cross the Sutledge for further conquests, and when called to cross it will not fail its general. Two thousand years ago and more, when Alexander the Great was in the Punjaub, he vainly strove, in the neighbourhood of the Sutledge, to induce his army to accompany him further. With eyes cast down, and in unbroken silence, they listened to those reproaches of their mighty leader which history has preserved, or has pretended to preserve. "Where," he exclaimed "is your eager shout, the index of your alacrity? Where are the countenances of my Macedonians? I do not know you, soldiers!" The British general will never need to address his troops in such a tone as this. Their well-known shout, their English shout, that shout which, rising above the roar of battle, appals the hearts and loosens the knees of foemen, will make itself heard in every danger. In all human probability there is yet more work for them to do. Once over the Sutledge, and it is not unlikely that another great battle will be fought, and another victory added by the army of India, to its long list of triumphs. But be that as it may, I cannot doubt that all opposition is by this time subdued; and that the English flag is now flying over the city of Lahore. Gentlemen, we couple upon this occasion the name of Sir Henry Hardinge with the army of India. Need I say that we do so through no feeling of disrespect to its gallant Commander-in-chief? We know that a braver man than Sir Hugh Gough never yet, taking his life in his hand, rushed on into the cannon's mouth. But we associate to-night the name of the second in command because we regard the Governor as well as the soldier, and because, also, we desire in this way to mark the friendly relation in which Sir Henry Hardinge stands to our distinguished guest. Gentlemen, I give you "Sir Henry Hardinge and the army of India!"

ON SIR G. NAPIER.

The CHAIRMAN :—I am now to give you the health of a man never to be named by me without a deep feeling of affection, our late Governor, Sir George Napier. If it be true that out of the abundance of the heart the mouth speaketh, I should have much to say in reference to this toast. But time draws on, and I have spoken much, perhaps too much, and I must not now indulge myself in dilating on a topic than which none can be to me more pleasing. Gentlemen, Sir George Napier, as might be expected from any member of his gallant family, was as brave as the sword he wore, and he had such a lofty scorn for anything mean or base that he would have lost his remaining hand rather than stoop to tolerate it. Our distinguished guest was not an easy man to succeed as governor, but Sir George Napier nevertheless did what he deemed his duty, with what success it is not for me, as an officer of his Government, to say. Nature had given him an impetuous spirit. It is such men who volunteer to lead storming parties, as he did at Cindad Rodrigo ; but she had also given him a large heart ; and no one can say that he ever triumphed in any man's downfall, or knowingly stood in the way of any man's fair advancement, or descended to job for any man, or refused any man a reasonable kindness which it was in his power to bestow. These qualities earned for him the respect and goodwill of the inhabitants, and when he left your shores I saw the soldier's tear, so much was he touched by kindness showed towards him ; and the additional compliment which you are, I see, to-night prepared to pay him, in which our guest, I know, is ready heartily to join, will reach him in England, and convince him that, as he has not forgotten us, so by us he is not forgotten. Gentlemen, I give the health of Sir George Napier.

ON THE JUDGES.

The CHAIRMAN said :—Gentlemen, I now call upon you to drink the Judges of the Colony. The station and office of these high

functionaries would of themselves demand our respectful notice, even were these functionaries less worthy of our confidence and regard. To your judges mainly are entrusted the decision of some of the most important questions that can affect you as social beings, questions affecting reputation, property, liberty, and life. Gentlemen, a practitioner in the Supreme Court may be allowed to bear his testimony to the learning, uprightness, perfect independence, and obvious anxiety to do justice, by which the bench of this Colony is creditably distinguished. Gentlemen, I regret that the Chief Justice is not here in body, but I am sure in spirit he is with us. I cannot doubt but that, did public duty permit, he would readily forsake all the charms of the country through which he is now travelling in order to look upon such a muster as the present, collected for such an object. He may now be exclaiming, in the words of Scott's animated couplet, slightly altered,—

'Twere worth ten years of circuit life
One glance at their array!

But Mr. Justice Menzies is here, and happy to be here; and so is the worthy connection of our distinguished guest, Mr. Justice Musgrave. Gentlemen, "The Judges."

ON THE COMMERCIAL AND AGRICULTURAL INTERESTS.

THE CHAIRMAN :—Gentlemen, the prosperity of this Colony rests upon two pillars, its commerce and its agriculture. Gentlemen, the great commercial middle classes must by every Englishman be regarded as of great importance and as deserving of great respect. Buonaparte contemptuously called the English "a nation of shopkeepers," but in the long run the shopkeepers of England got the better of the chivalry of France. I trust that the merchants of this Colony, looking to the rock from which they are hewn, the commercial interest of England, will be always mindful

to uphold that character for high integrity which makes the name of a British merchant respectable throughout the earth, and forms the only sure foundation for commercial prosperity. Nor must our agriculture be overlooked ; your produce determines your consumption ; your exports govern your imports ; and it is by your growing agriculture that your growing commerce must be fed. Both are now prospering amongst us ; may both go on and prosper. Gentlemen, I give the Commercial and Agricultural Interests of the Colony.

ON EXPENSES OF A MISSION TO ABORIGINAL AND NATIVE TRIBES.

[*Legislative Council, October 27, 1846.*]

ATTORNEY-GENERAL :—I may as well, perhaps, take the liberty of stating to the Council what occurs to me respecting this British Residency. Having been called upon by His Excellency the Governor to accompany him to Griqualand in the course of last year, and having been there employed in aiding him to make those arrangements of which this Residency forms a part, I feel in some degree called upon to offer my sentiments upon the subject. The Council will not fail to recollect that we have had, within a very short time, two marches of troops, attended both of them with great expense, for the purpose of pacifying, as it was called, the people beyond the Great River. The necessity of these military movements was a very urgent one, and arose out of a state of things of a very plain and simple nature. Between the Great River and the Dragensberg, and running up nearly as far as the 25th degree of latitude, there are located in greater or lesser fixity of tenure a population of colonial

extraction, numbering several thousand souls, a population in comparison with which the people for whom the new settlement of Natal was established were of small account ; the mass of our emigrant farmers being between the Great River and the Dragensberg, and not between the Dragensberg and the sea. Under these circumstances the question was, whether Her Majesty the Queen was to leave those emigrants without protection and control, to allow the painter to be cut, and those who have taken to the boat and left the ship to shift for themselves, and thus to leave room for the introduction of a state of things similar to that which led to all the expense, anxiety, trouble, and excitement, which preceded, and brought about, the establishment of a settled Government at Natal ? The alternative course was very easy. There could, in one point of view, have been no difficulty in permitting the Boers to assert a virtual independence. But Her Majesty's Government could never take this easy course, because, even if the law of nations allowed us to send our people amongst native tribes, and leave them there alone, the sentiments and feelings of the English nation would never allow us to do so, nor to permit our colonists to invade, with numbers and with strong hand, the territories of men unable to compete with the new comers for the possession of the soil. We must, to some extent, follow and control those whom we cannot keep in the Colony. No other principle than this led to the creation of the new settlement of Natal. No other principle than this led to the military movements beyond the Orange River. The very great expense of these was incurred in order to settle disputes between the Boers upon the Riet, the Modder, and the Caledon Rivers, and the Griqua Captain, Adam Kok. When the Governor was on the spot last year, he soon saw that unless some system were devised for settling disputes, in their first stages, military marches and such things must be matters of frequent occurrence, and he therefore set about considering how such a system could be devised. One essential point of such a system was very evident. It was plain that, situated as the Boers and the natives were with regard to each other, nothing but the presence upon the spot of some officer, influential from his position, from the force at his command, and

from his close connection with the Colonial Government, whose great duty it should be to keep the peace, could avert continual discord, with all its consequences. For how were those parties respectively situated? The Griquas, I speak of them as representing a class, asserting ownership of the soil and social independence, would not sink into serfs, or become hewers of wood and drawers of water for the strangers settled in their country, or submit to them as to a paramount. Upon the other hand, there was not a Boer beyond the boundary who would not laugh to scorn the idea that they, with their Raads and communities, and arms in their hands, were to submit their persons to the jurisdiction of Adam Kok and his Griquas, and live like Frenchmen in England, or Englishmen in France. Not Grotius, Puffendorf, and Vattel together, could persuade bodies of men such as our emigrants to recognize the authority or laws of such a people as the Griquas. And there the two parties were placed, in perpetual contact, and with constant causes of dispute, without any admitted superiority on either side; the Griqua standing upon his territorial rights, and the Boer upon his positive power. In the absence of all authoritative mediation, every trifle was liable to swell into a war. From very small beginnings, flowing forth from most miserable fountains, there gradually collected a mass of waters which threatened extensive devastation, and troops and money to a large extent were finally needed to quell disturbances, which an active officer at a salary of £600 per annum, and with arrangements which place at all times a considerable force within his reach, would have entirely prevented. What was wanted was an intelligent and honest man, half magistrate, half soldier, who, whenever danger threatened, could assert an armed intervention, and settle all disputes by his equitable and authoritative mediation. The origin of the war last year, what was it? Two Basutos, domiciled with the Griquas, were, for some alleged offence, flogged by a Boer. The men thus illegally punished complained to Adam Kok, who summoned the offender to appear and answer the complaint. As was to be expected, no notice was taken of this summons, and when Adam Kok, miscalculating his power, thought to use force, the Boers

drew together into their laagers ; and the result was a general war, with a rapid march of cavalry and infantry, of His Honour the Lieutenant-Governor, and of the Governor himself, and a consequent expense of something about £30,000. What would have been the case had there been then a British Resident ? Why, but the other day we had some proof of what such a functionary could effect. Certain Boers, instigated by one Jan Kok, a troublesome personage from Graaff-Reinet, taking advantage of the opportunity presented by the employment of the troops in conflict with the Kafirs, determined to force Adam Kok to restore the cattle received by him at the termination of last year's war. They put forward a manifesto, conceived in not intemperate language, but which, after all, amounted to a declaration that the Griquas should, if necessary, be spoiled with a strong hand. Had there been no British Resident, had Captain Warden been contending with the Kafirs, nothing on earth could have prevented the Boers from being out against the Griquas, and the Griquas against Boers, and, in one way or other, either by the Griquas falling back upon the Colony, or by the Boers calling for sympathy from their friends on this side of the river, the peace of the Colony in that direction must have been perilled. What did Captain Warden do ? With admirable spirit and celerity, he called out the native contingents, which by treaty are placed at his disposal, combined with these his own handful of men, pushed forward with promptitude to where the turbulent were assembled, demanded their instant surrender, and on their refusal opened a fire, which, with a trifling loss of life on the part of the disturbers of the public peace, and none upon his own, soon had the effect of quelling all opposition, of sending in several prisoners, and of restoring perfect tranquillity to that quarter of the country ; so that in a few days a conspiracy was nipped in the bud, which, had it been left to itself, would have become most formidable ; and in this way an officer, whose salary is but £600 a year, saved probably some £50,000—

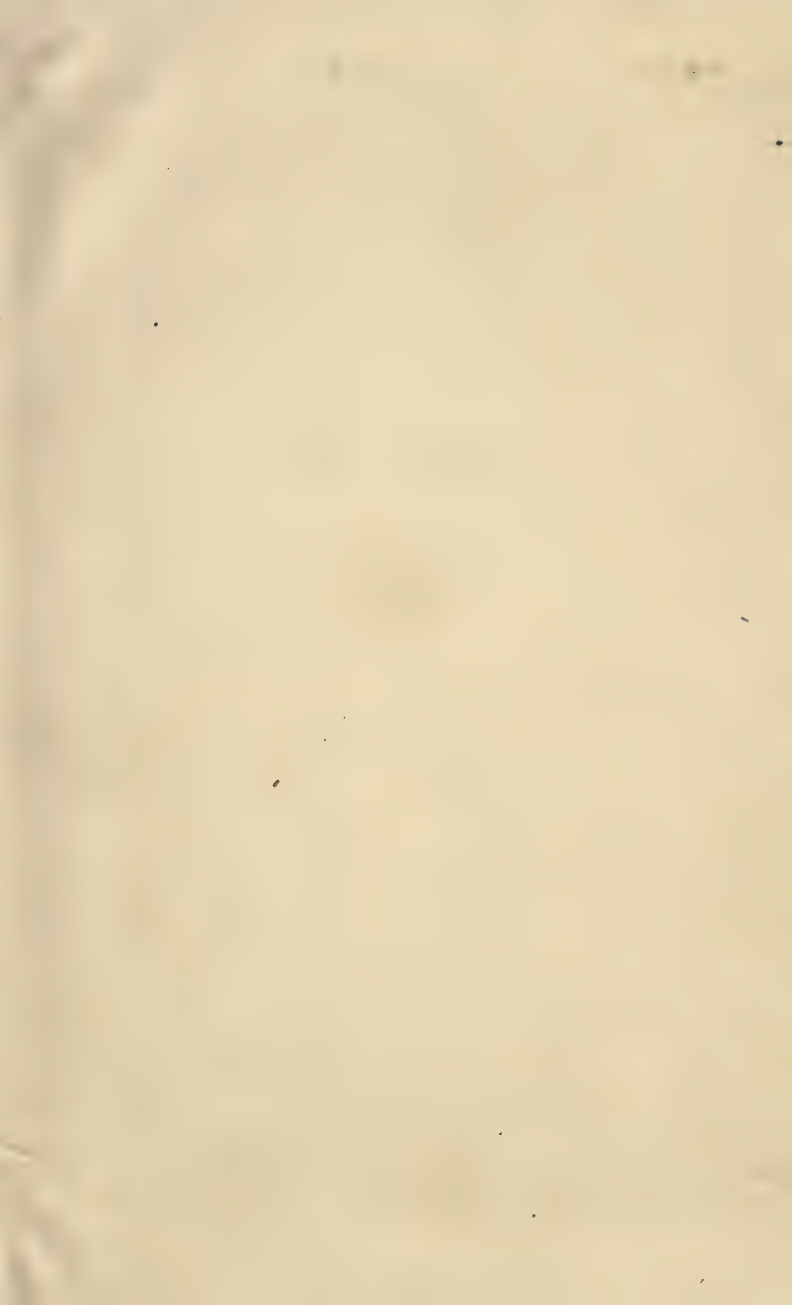
Mr. Ross.—To whom ?

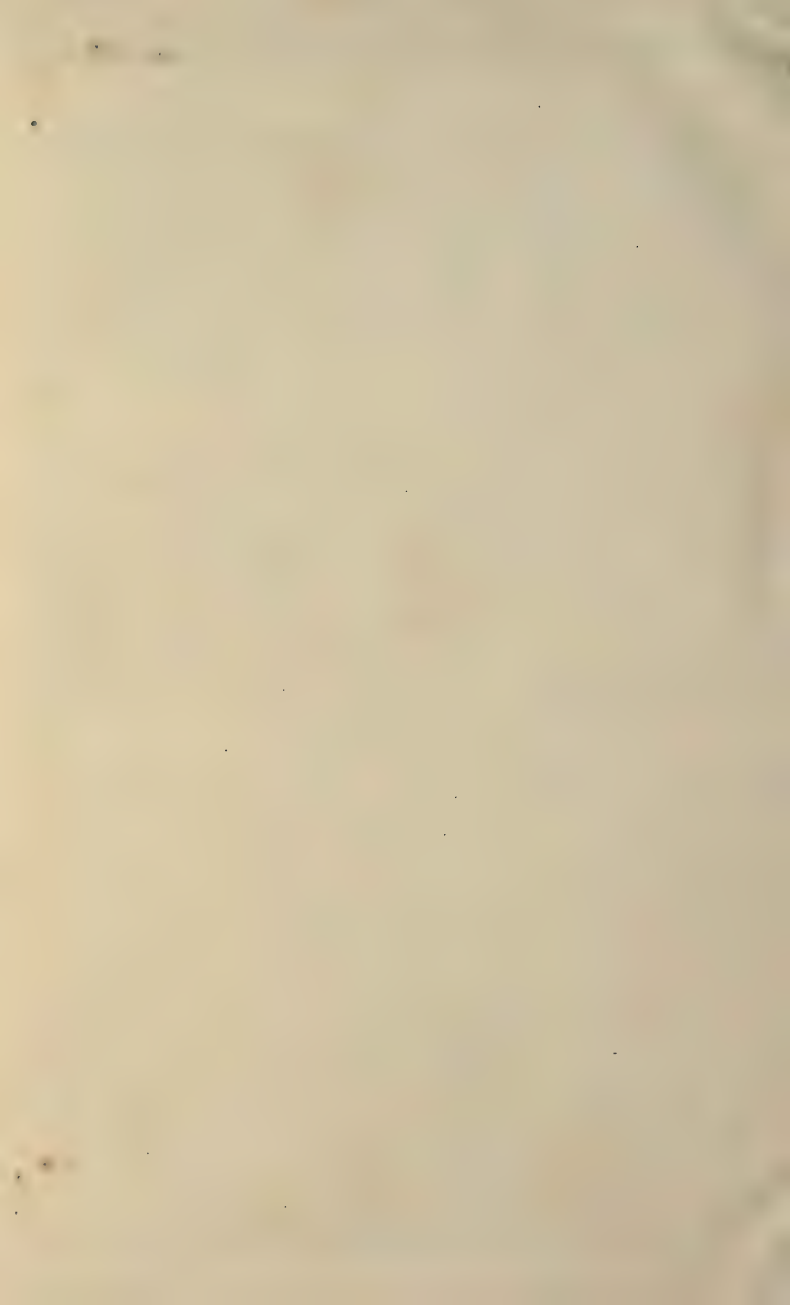
The ATTORNEY-GENERAL :—My hon. friend asks, to whom ? and, speaking frankly, I will not deny that it was the Governor's idea,

and certainly my own confident hope and expectation, that Her Majesty's Government, considering the nature and operation of the office, half civil and half military, civil to those who are civil themselves, military to those who are of another temper, would have seen in it such an obvious saving to the British treasury, which must bear the burthen of most of the charges which the Resident's exertions tend to render unnecessary, as to have decided that the whole expense of the establishment should be taken over and provided for by Parliament. This, however, Her Majesty's Government have declined to do. Such a charge would certainly be a novel one ; and probably there is nothing which the Home Government feels to be matter of more embarrassment than that of proposing novel votes ; for it so happens that the House of Commons, though no doubt a far inferior body, resembles in some degree the august assembly which I have now the honour to address, and is wonderfully given to object to every item which they are called upon to vote for a first time ; whereas expenses which have the stamp of antiquity upon them pass with comparative ease ; and so I take it that the Secretary of State, standing, in regard to the House of Commons, in that wholesome awe which my hon. friend the Secretary to Government feels for the scrutiny of this Council, was very unwilling to put such a charge upon the Imperial estimates. Be the cause, however, what it may, certain it is that her Majesty's Government did two things : approve decidedly of the establishment of the Residency, and as decidedly disapprove of paying for it out of British funds ; and while I must clearly and candidly express my regret that the question was not viewed at home as I at one time hoped it would be, I am deliberately of opinion that it is better for the Colony to pay for this establishment, rather than that it should not be paid for at all. The question is not whether the charge ought to fall upon the Colony rather than upon the British treasury. Upon that point I have already given my opinion. But the question is, whether, connected as this Colony is with the emigrant farmers, and the country in which they reside, it is not better to support the charge out of colonial funds than to permit the former state of things to be restored. These emigrants are a portion of ourselves ; we are morally re-

sponsible for them. Friendly tribes in our neighbourhood have a right to expect that they shall not be oppressed by colonists who locate themselves in their territories. It is for your interest that your fellow colonists should be kept to their good behaviour. Tell me how you would have stood in England, in regard to the present Kafir war, had the Governor's manifesto not exonerated the colonists from every imputation? You know how the last Kafir war was viewed by many. But with respect to the present war, is there a newspaper in England, is there a public body, is there one from amongst those called contemptuously (for my own part I think and speak of them respectfully) philanthropists, who has come forward to accuse you? None. Think you, then, that the Governor's emphatic announcement that not a single act of violence or outrage had been committed for seven years and upwards throughout all Kafirland has had no effect? Do you believe that if that announcement had been reversed, and we had been obliged to admit that colonists had left us who had seized the lands and oppressed the persons of the Kafirs, there would have been the same sympathy for the Colony which now prevails? or that we should receive from the British Government, and the British people, the same support? No doubt the war is now with Kafirland. But the principle is general, and I make the allusion to convince you how short-sighted would be your policy were you to leave it in the power of any tribe or people with whom you come in contact, to charge upon any of your emigrants the commission of any crimes or offences which we have power to repress. Because this Residency may effect a large saving for the Home Government, is no reason why it should not also be a benefit to us. I do, indeed, think that, had I been Secretary of State, it would have occurred to me to pay the money. But then, looking at our relations with the emigrant Boers and the tribes beyond, to the positive misery of recurring disturbances in that quarter, to the advantage which we must derive from the preservation of our character, and to the comparatively trifling outlay which is required at our hands, I am clearly of opinion that such an arrangement as that which has been made, one involving no claim of sovereignty, no demand of soil, but merely the residence of an officer, competent

to compose all differences, and who will treat as enemies all persons, white or coloured, who seek by violence or injustice to disturb the public peace, is one so important and so useful as to call upon this Council to support it rather than that it should sink ; and I have therefore thought it right, for the reasons stated in the outset, to make these remarks, in order to explain in some degree the position of the question, and to justify the vote which I shall give in favour of the grant.





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